Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1335

THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,

Appellants,

VERSUS

WANDA JUNE WEEKS, ET AL.,

Appellees,

and

DOROTHY FRAZIER AND RUTH RATTLER, ET AL.

Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Introduction	2
Opinion Below	2
Jurisdiction	3
Questions Presented	4
Statute Involved	7
Statement	10
The Questions Are Substantial	13
Conclusion	35

Certificate of Service follows Appendices.

APPENDICES

Appendix A:

Judgment of the United States District Court for the Western District of Oklahoma, in Consolidated Cases No. CIV-73-586-E and CIV-74-368-D, filed Dec. 18, 1975 1-4

Memorandum Opinion of the United States District Court for the Western District of Oklahoma, in Consolidated Cases No. CIV-73-586-E and CIV-74-368-D, filed Dec. 18, 1975 5-90

Order of the United States District Court for the Western District of Oklahoma, in Consolidated Cases No. CIV-73-586-E and CIV-74-368-D, sustaining and overruling specific motions and applications of the respective parties herein, filed Nov. 1, 1974 90-95

TABLE OF AUTHORITIES CONTINUED PAGE

Amendment to Order (above) designating cost of Notice by Mailing and Publication to be borne by plaintiff, filed Nov. 4, 1974 96-97

Order (Cases No. CIV-73-586-E and CIV-74-368-D) Approving Forms of Class Action Notice and Procedures for Giving Notice, filed Nov. 18, 1974 98-100

Exhibit "A"—Notice of Class Action Lawsuit by Certified Mail to members of the Kansas Delaware Class of Indians (same numbers above) 100-104

Exhibit "B"—Notice by Publication of Class Action Lawsuit to members of the Cherokee Delaware Class of Indians (same numbers above) 105-109

Exhibit "C"—Notice by Publication of Class Action Lawsuit to members of the Absentee Delaware Tribe of Oklahoma now known as the Delaware Tribe of Western Oklahoma, designated as the Absentee Delaware Class (same case numbers above) 109-113

Notice of Appeal to Supreme Court of the United States by the defendants and intervenors (same case numbers above), filed Jan. 16, 1976 114-117

Appendix B:

82 Stat. 861, 862; 25 U.S.C., Sections 1181-1186 117-119

Appendix C:

Treaty of 1854 (10 Stat. 1048) 119-122

Appendix D:

Treaty of 1860 (12 Stat. 1129) 123-126

Appendix E:

Treaty of 1866 (14 Stat. 793) 127-135

TABLE OF AUTHORITIES

CASES:	PAGE
Baciarelli v. Morton, 481 F.2d 610 (9th Cir. 1973)	24
Baker v. Carr, 369 U.S. 186	4, 18, 19, 20
Dandridge v. Williams, 397 U.S. 471	32
Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. United States, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955)	15
Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. United States, 192 Ct.Cl. 906, 427 F.2d 1218 (1970)	15
Eisen v. Carlisle and Jacquelin, 417 U.S. 156	22
Elk v. Wilkins, 112 U.S. 94	7, 11, 12
Fondahn v. Native Village, 450 F.2d 570 (9th Cir. 1971)	24
Goldberg v. Kelly, 397 U.S. 254	31
Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971)	23, 25
Hicks v. Miranda, 422 U.S. 332	23, 34
Hurley v. Kincaid, 285 U.S. 95	35
Jefferson v. Hackney, 406 U.S. 535	32
Jimenez v. Weinberger, 417 U.S. 628	31
Lone Wolf v. Hitchcock, 187 U.S. 553	4, 13, 18, 20
Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957)	23, 24
McGowan v. Maryland, 366 U.S. 420	31
Minnesota Chippewa Tribe v. United States, 161 Ct.Cl. 258, 315 F.2d 906 (1971)	5, 27, 28, 29
Morton v. Mancari, 417 U.S. 535, reversing 359 F. Supp. 585	4, 14, 18, 21
National Indian Youth Council v. Bruce, 485 F.2d 97 (10th Cir. 1973)	23
Northwestern Shoshone Tribe v. United States, 324 U.S. 335	32

AUTHORITIES CONTINUED PAGE

Reed v. Reed, 404 U.S. 71 31
Regional Rail Reorganization Act Cases, 419 U.S. 102 35
Shapiro v. Thompson, 394 U.S. 618 31
Simmons v. Eagle Seelatsee, 384 U.S. 209, affirming, 244 F.Supp. 808 (E.D. Wash. 1965) 5, 13, 33-34
Snoqualmie Tribe v. United States, 178 Ct.Cl. 570, 372 F.2d 951 (1967) 28
Stanley v. Illinois, 405 U.S. 645 31
Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), affirming, 360 F.Supp. 452 (D.N.M. 1974) 23
Tiger v. Western Investment Company, 221 U.S. 86 19
United States v. Sandoval, 231 U.S. 28 19
United States v. United States Fidelity and Guaranty Company, 309 U.S. 506 5, 13, 21, 22, 24, 25
Weinberger v. Salfi, 422 U.S. 749 6, 26-27, 31

INDIAN CLAIMS COMMISSION DECISIONS:

Delaware Tribe v. United States (Docket 27A) 11
Absentee Delaware Tribe v. United States (Docket 241) 11
Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma v. United States
2 Ind. Cl. Comm. 253 (1953) 15
3 Ind. Cl. Comm. 622 (1955) 15
4 Ind. Cl. Comm. 346 (1956) 15
8 Ind. Cl. Comm. 150 (1959) 15
9 Ind. Cl. Comm. 1 (1960) 15
21 Ind. Cl. Comm. 18 (1969) 15
21 Ind. Cl. Comm. 344 (1969) 2
24 Ind. Cl. Comm. 179 (1970) 15
24 Ind. Cl. Comm. 468 (1971) 15

UNITED STATES CONSTITUTION:

Amendment V 4, 7, 11, 12

AUTHORITIES CONTINUED PAGE

STATUTES:

Statutes at Large—

60 Stat. 968 33
82 Stat. 861 ..... 10, 11, 13, 31
86 Stat. 762 ..... 2, 3, 4, 7-10, 11, 13, 24, 25
88 Stat. 77 29
Act of June 22, 1874, ch. 389, 18 Stat. 146, 175 10

United States Code—

25 U.S.C. 70-70v 14
25 U.S.C. 607 33
25 U.S.C. 1181-1186 ..... 10, 11, 13, 31
25 U.S.C. 1291-1297 ..... 2, 7-10, 11, 13, 25
25 U.S.C. 1451-1452 29
25 U.S.C. 1491 34
28 U.S.C. 1252 4
28 U.S.C. 1331(a) 2
28 U.S.C. 1505 ..... 14, 34
28 U.S.C. 2101(a) 4
28 U.S.C. 2282 2

TREATIES:

Treaty of May 6, 1854, 10 Stat. 1048 10
Treaty of July 27, 1860, 12 Stat. 1129 10
Treaty of July 4, 1866, 14 Stat. 793 ..... 10, 12

FEDERAL RULES OF CIVIL PROCEDURE:

Fed.R.Civ.P. 23(b)(1)(B) 5
Fed.R.Civ.P. 23(b)(2) 5
Fed.R.Civ.P. 54(b) 24

MISCELLANEOUS:

Treatise—

Cohen, *Federal Indian Law*, pages 43-44 (Revised Ed. 1958) 16

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

THOMAS S. KLEPPE, Secretary of the Interior of the United States of America, THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR, ET AL.,
Appellants-Cross-Appellees,

VERSUS

WANDA JUNE WEEKS, ET AL.,
Appellees-Cross-Appellants,

and

THOMAS S. KLEPPE, ET AL., Secretary of the Interior of the United States of America,
Appellants-Cross-Appellees,

VERSUS

DOROTHY FRAZIER and RUTH RATTLER, ET AL.,
Appellees-Cross-Appellants,

and

THE ABSENTEE DELAWARE TRIBE OF WESTERN OKLAHOMA BUSINESS COMMITTEE, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware Class,
Intervenors-Appellants.

On Appeal from the United States District Court for the Western District of Oklahoma

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants,[1] members of the Absentee Delaware Tribe of Western Oklahoma Business Committee whom the District Court certified as representative members of the defendant class, Absentee Delaware Tribe of Western Oklahoma, the statutorily-defined beneficiaries of the distribution statute here at issue, appeal from the decision of a divided panel of the United States District Court for the Western District of Oklahoma, holding unconstitutional and enjoining the operation of Pub.L. 92-456, 86 Stat. 762, 763, 25 U.S.C. 1291-1297, and submit this Statement to show that this Court has jurisdiction of the appeal, and that substantial questions of constitutional law are presented by the decision below.

OPINION BELOW

The opinion of the District Court of the Western District of Oklahoma, ___ F.Supp. ___, is not yet officially reported. A copy of the opinion, judgment and pertinent orders, prior and subsequent to judgment, are attached hereto as Appendix A.

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[1]The named appellants herein are also named cross-appellees in the cross-appeal filed by Wanda June Weeks, et al. Because the parties are numerous, the term appellants is employed to describe the named appealing parties on whose behalf this particular Jurisdictional Statement is filed.

JURISDICTION

This suit was initiated by appellee Wanda Weeks,[2] pursuant to U.S.C. Section 1331(a). Appellee's complaint alleged that 86 Stat. 762, 763, 25 U.S.C. 1291-1297, a statute distributing judgment funds appropriated to pay the Final Award of the Indian Claims Commission in Dockets 72 and 298[3] was invidiously discriminatory in (1) excluding appellee from its terms, (2) including the recipients named in the statute, and (3) depriving appellee of her property without just compensation, and was, therefore, violative of the Fifth Amendment to the Constitution.

Appellee sought an injunction restraining the operation of the statute. Pursuant to 28 U.S.C. 2282, a three-judge District Court, consisting of United States Circuit Judge William J. Holloway, Jr., Chief United States District Judge Fred Daugherty and United States District Judge Luther B. Eubanks was convened.

On September 5, 1973, a restraining order was entered, after notice to the parties. On March 21, 1974, a preliminary injunction restraining operation of the statute was entered, after notice and hearing, by Judges Holloway and Eubanks.[4] On December 18, 1975, the District Court

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[2]A similar suit was initiated by appellees Dorothy Frazier and Ruth Rattler in the District Court of the Northern District of Oklahoma and, thereafter, consolidated with this suit. The District Court's judgment was so entered as to cover both suits, on behalf of a single class of plaintiffs (App. pp. 3, 9).

[3]21 Ind. Cl. Comm. 344.

[4]Chief District Judge Daugherty was unable to be present at the hearing on the preliminary injunction. The hearing on the preliminary injunction was, therefore, conducted before the two judges named above. No objection is raised to this procedure.

entered its judgment holding 86 Stat. 762, 763, 25 U.S.C. 1291-1297 violative of the "equal protection component" of the Fifth Amendment, insofar as it excluded appellee and the class she represented. Notice of Appeal was filed on January 16, 1976 in the United States District Court for the Western District of Oklahoma (App. pp. 114-117). The jurisdiction of this Court to review the decision below by direct appeal is conferred by Title 28, United States Code, Sections 1252 and 2101(a). *Morton* v. *Mancari*, 417 U.S. 535, 535-537.

QUESTIONS PRESENTED

The District Court held 86 Stat. 762, 763, 25 U.S.C. 1291-1297, a statutory scheme distributing some nine million dollars to satisfy an award of the Indian Claims Commission, unconstitutional for failure to conform to the "equal protection component" of the Due Process clause of the Fifth Amendment. The questions presented by this holding of first impression are:

1. Whether, in the circumstances of this case, the holding of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-568, has, as the District Court implied, been overruled, *sub silento*, by *Baker* v. *Carr*, 369 U.S. 189, 210-211, 215?

2. Whether the decision of the District Court is inconsistent with *Morton* v. *Mancari*, 417 U.S. 535, 552-553 and n. 24, regarding permissible distinctions between individuals who are, or may be, members of federally recognized Indian Tribes and other individuals, who could be racially classified as "Indians," but who do not meet the statutory

or tribal criteria for membership in a federally recognized tribe?

3. Whether the District Court erred in limiting to its particular facts this Court's affirmance of *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, *aff'g* 224 F.Supp. 808 (E.D. Wash. 1965), and refusing to apply the principle of *Simmons* in the present case?

4. Whether Federal Rule of Civil Procedure 23(b)(1)(B) and 23(b)(2) were improperly employed by the District Court to avoid dismissing this action, and, if so, whether the admitted immunity of the tribal business committee from suit and its status as an indispensable party was disregarded through a use of class action procedure which contravenes this Court's holding in *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, 512-513?

5. Whether the District Court erred in holding that Congress was forbidden by the Constitution from relying upon the holding of the Court of Claims that "the Indian Claims Commission Act requires that awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today?" *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971).[5]

6. Whether an Act of Congress, distributing judgment funds and involving a noncontractual, nonvested claim on

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[5]No question is raised as to the power of Congress to disregard this construction of the Act if Congress chooses; the question is whether the Constitution forbids Congress from adopting this construction of the Act if, after consideration, Congress elects to do so.

the public Treasury, must meet the rigorous standards of judicial review applicable to statutes involving criminal procedure, parental custody proceedings, marital and family relations, and other basic liberties of the individual, or whether the more flexible standard of review employed in areas of economic and social benefit legislation is applicable to such an Act of Congress?

7. Whether the holding of the District Court, which, as applied, requires that statutes distributing judgment funds be drafted so as to permit an individualized hearing of, and determination upon, the claim of every person who alleges ancestry in an Indian tribe from the "time of the wrong" is inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785?

8. (a) Whether the District Court erred in adopting as a standard for constitutional review of Indian claims judgment statutes a theory of "but for" causation, inseparably linking the judgment statutes to the theoretical circumstances which could have, but did not, exist, at the "time of the wrong" without regard for any intervening circumstances or events, *e.g.*, by holding that if a sum certain had been paid to the Delaware Tribe in 1854, the Constitution requires a conclusive presumption that this same sum would have been a part of the tribe's assets decades later?

(b) Particularly, whether the District Court erred in holding that the Treaty of July 4, 1866, 14 Stat. 793, 796, by which the ancestors of the present "Kansas Delaware" claimants renounced their Delaware citizenship and right to participate in tribal councils, and assumed United States

citizenship and other benefits unavailable, at that time, to tribal Indians, see, *Elk* v. *Wilkins*, 112 U.S. 94, 103-106, was irrelevant because the Due Process Clause commands Congress to conclusively presume "but for" causation in judgment statutes?

9. Whether, regardless of the standard of review employed, the terms of 86 Stat. 762, 763, 25 U.S.C. 1291-1297 are so arbitrary and capricious as to be violative of the Due Process Clause of the Fifth Amendment?

10. Whether the District Court erred in disregarding the congressional policy of distributing Indian claims judgment awards on a basis other than ethnological "tracing" of "blood descendants" from the "time of the wrong" for which the award is made, in the absence of an unequivocal showing that this congressional policy is repugnant to the Due Process Clause of the Fifth Amendment?

11. Whether the District Court properly enjoined the operation of an Act of Congress upon the complaint of parties alleging a monetary taking, rather than dismissing the complaint without prejudice to an action in the Court of Claims?

STATUTE INVOLVED

Pub.L. 92-456; 86 Stat. 762, 763; 25 U.S.C. 1291-97:

> "The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be neces-

sary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

"The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

"(a) they were born on or prior to and were living on October 3, 1972; and

"(b) they are citizens of the United States; and

"(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

"(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary.

"All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director

in writing of its judgment regarding the eligibility of the applicant.

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."[6]

STATEMENT

Appellees, the "Kansas Delawares," certified by the court below as a "class" consisting of descendants of certain Delaware Indians who resigned from the Delaware Tribe pursuant to an 1866 Treaty between the Tribe and the United States, and whose names were, therefore, listed in an 1867 Registry prepared pursuant to this 1866 Treaty, see,

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[6]The other modern statute relevant to the District Court's decision is Pub.L. 90-508, 82 Stat. 861, 862, 25 U.S.C. 1181-1186. Other treaties and statutes relevant to the District Court's view of this case include: Treaty of May 6, 1854, between the United States and the Delaware Tribe, 10 Stat. 1048; Treaty of July 27, 1860, between the United States and the Delaware Tribe, 12 Stat. 1129; Treaty of July 1, 1866, between the United States and the Delaware Tribe, 14 Stat. 793; and Act of June 22, 1874, ch. 389, 18 Stat. 146, 175. Portions of the foregoing are set forth as Appendix B to this brief.

Elk v. *Wilkins*, 112 U.S. 94, 103-106, filed this suit alleging that 86 Stat. 762, 763, 25 U.S.C. 1291-1297, was arbitrary and capricious in its terms, and therefore, violative of the Fifth Amendment.[7]

Appellees alleged that Congress was required to distribute all funds from the Indian Claims Commission Award *only* to their class, *i.e.*, descendants of those who had resigned from the Delaware Tribe in 1866. Since Congress had distributed these funds to other individual Delaware Indians and to the statutorily-defined members of the tribal entities of two modern tribes, the Delaware Tribe of Oklahoma and the Absentee Delaware Tribe of Western Oklahoma, appellees sought to void the statute.

A majority of the District Court agreed with appellees as to one aspect of their equal protection claim and entered an injunction voiding the statute in its entirety.

Appellees' claim that all funds resulting from payment of the Final Award entered by the Indian Claims Commission in *Delaware Tribe* v. *United States* (Docket 241) and *Absentee Delaware Tribe* v. *United States* (Docket 27A) should, by force of the Constitution, have been appropriated and distributed to them alone was unanimously rejected by the District Court. The District Court also unanimously rejected appellees' contentions that (1) they had a vested right, within the meaning of the Just Compensation Clause of the Fifth Amendment, to any of these funds and (2) that

[7]Appellees also challenged the constitutionality of 82 Stat. 861, 25 U.S.C. 1181-1186 insofar as it included members of the Delaware Tribe of Oklahoma in its provisions; the right of the appellants herein to be included in the distributive provisions of this statute was conceded by appellees.

no member of the Delaware Tribe of Oklahoma[8] and no member of the Absentee Delaware Tribe of Western Oklahoma[9] could be named in the distribution statute.

However, a majority[10] of the District Court held that the statute was arbitrary and invidiously discriminatory in excluding certain descendants of individuals who had been members of the Delaware Tribe in 1854; that the Award entered by the Indian Claims Commission was to recompense an injury done to the tribe in 1854; and that Congress could not exclude certain "blood descendants" of 1854 Delaware tribal members without violating the equal protection component of the Fifth Amendment. The court below, in reaching this conclusion, found irrelevant the Treaty of July 4, 1866, 14 Stat. 793, 796, and this Court's contemporaneous interpretation of such treaties in *Elk* v. *Wilkins*, *supra*, 112 U.S. at 104-106, pursuant to which the ancestors of the Kansas Delaware claimants had: (1) resigned from the Delaware Tribe, (2) renounced Delaware citizenship, (3) taken United States citizenship, (4) taken individual tracts of land in fee from the United States and (5) received their pro rata share of Delaware tribal assets. It likewise found unpersuasive the lack of federal recognition of the individuals it certified as the Kansas Delaware Class, holding the constitutional question was one of blood descendancy rather than tribal structure or recognition.

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[8]Certified as a defendant class denominated the "Cherokee Delawares" by the District Court.

[9]Certified by the court below as the "Absentee Delaware" class (App. pp. 3, 91-93, 110-113). As discussed *infra*, we believe the *use* made of this "certification" was improper.

[10]Chief District Judge Daugherty dissented; Judge Daugherty held the statute to be entirely valid (App. pp. 82, 89-90).

Finally, it found unpersuasive the extraordinary administrative difficulties previously encountered by the Department of the Interior in attempting to distribute an earlier Delaware Claims judgment[11] and rejected, after a short, one-day trial, the possibility that 25 U.S.C. 1291-1297, could be considered a rational Act of Congress.

The District Court, therefore, held the statute to be impermissibly "underinclusive" and enjoined its operation.

THE QUESTIONS ARE SUBSTANTIAL

1. The decision of the majority of the court below presents to this Court a constitutional holding of first impression, and great public importance in the administration of federal Indian law. Chief Judge Daugherty, dissenting below, correctly emphasized that there is not "a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein" (App. p. 83). The holding of the majority below, which disregards this Court's holdings in, *e.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553; *United States* v. *United States Fidelity and Guaranty Company*, 309 U.S. 506, and *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209 *affirming*, 244 F.Supp. 808 (E.D. Wash. 1965), by limitation of these cases to their precise facts, apparently establishes, as a rule of constitutional law, the extraordinary principle that the scores of judgments paid to Indian tribes or tribal

[11] 82 Stat. 861, 25 U.S.C. Sections 1181-1186. This is the statute challenged, in part, by appellees as against appellant Cherokee Delaware Class, not as against appellant Absentee Delaware Class and found, by the court below, to be free from any constitutional infirmity.

groupings, pursuant to 25 U.S.C. 70-70v (The Indian Claims Commission Act) and 28 U.S.C. 1505 (the similar Court of Claims jurisdictional statute for post-1951 claims) must be paid only to all those individuals who can demonstrate—by acceptable ethnological proof—that their ancestors were "members" of a particular historic tribe at the "time of the wrong" for which the judgment was entered. The decision also establishes an extraordinary conclusive presumption of "but for" causation as the benchmark of constitutionality for all payments of such judgments—regardless of intervening historical events.

If, as we submit, the unprecedented decision of the majority below is not unquestionably commanded by the Constitution, this Court should unequivocally reverse. The decision calls into constitutional doubt scores of distributions of judgment awards made by Congress to Indian tribes, or tribal groupings, by use of rolls of names, approved membership rosters of present-day tribes, and similar criteria. Two terms past, this Court reversed a similarly unprecedented decision of a three-judge District Court, observing that were it followed "an entire Title of the United States Code (25 U.S.C.) would be effectively erased. . . ." *Morton* v. *Mancari*, 417 U.S. 535, 554. The present case presents the precedent not to erase Title 25 but, worse, to cast it, and its proper constitutional interpretation, into hopeless confusion.

This Court should give plenary consideration to, and explanation of, the question whether the Constitution draws a bright line which Congress cannot cross in enacting Indian claims judgment legislation. The present litigation illustrates the public importance of this issue vividly:

this case arises out of a claim filed with the Indian Claims Commission in 1951; after six opinions by the Claims Commission[12] and two appeals to the Court of Claims,[13] a Final Award was entered by the Commission in 1969. Congress, after lengthy public hearings, enacted the statute now at issue in 1972; it was signed by the President in 1972; from September 5, 1973, until Final Judgment below, the Department of the Interior was restrained from any implementation of the statute by a preliminary injunction issued by the District Court. Now, after the judgment entered by two of the three judges of the court below, appellants are told that they must go back to Congress and seek yet another statute; that the Constitution requires Congress to follow a rule of "lineal descendancy" in enacting any pro rata distribution in such a statute; that Congress violated the Constitution when it departed from a "lineal descendancy" provision—contained in a 1968 Delaware judgment statute—which, in Chief Judge Daugherty's words, created

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[12] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 2 Ind. Cl. Comm. 253 (1953); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 3 Ind. Cl. Comm. 622 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 4 Ind. Cl. Comm. 346 (1956); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 8 Ind. Cl. Comm. 150 (1959); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1 (1960); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 18 (1969); see also *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 179 (1970); and *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 24 Ind. Cl. Comm. 468 (1971).

[13] *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 130 Ct.Cl. 782, 128 F.Supp. 391 (1955); *Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma* v. *United States*, 192 Ct. Cl. 906, 427 F.2d 1218 (1970).

"such problems, turmoil, confusion and delay that these funds have not yet been fully distributed!" (App. p. 86).

Appellants urge that Chief Judge Daugherty is correct; that such an extraordinary exercise in ethnology is not commanded by the Constitution, and that the judgment below should be reversed.

The unprecedented decision below limited to their precise facts, several landmarks of Federal Indian law. The court erred in so doing.

Felix S. Cohen, summarizing what has been, prior to the decision of the majority below, undisputed law wrote:

> An Indian tribe does have power to determine its membership for certain purposes. But this power may be of little importance in some instances because Congress may, by law, provide for an enrollment of members for a specified purpose. In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among the members of the tribe. Thus, the United States may assume full control over Indian tribes *and determine membership in the tribes* for the purpose of adjusting rights in tribal property. The assumption of power on the part of the Federal Government to distribute tribal funds and land among the individual members of the tribe required the preparation of payment rolls. Several treaties and statutes have authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees . . . In addition to its ultimate authority to *decide tribal membership*, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may be distributed only to tribal members. Cohen, *Federal Indian Law*, p. 43-44 (Revised Ed. 1958); (Emphasis added; footnotes omitted.).

In summarizing this settled law, Cohen discusses *nine* decisions of this Court. If Cohen's statement is correct, the District Court plainly erred, for its holding would require Cohen to have written:

> An Indian tribe does have power to determine its membership for certain purposes. But this power may be of little importance in some instances because Congress may by law provide for an enrollment of members for a specified purpose *so long as the purpose is deemed by federal district courts to be a proper one and the means chosen by Congress to achieve its purpose are found by a federal district court, after trial, to conform to the ethnological standard of lineal descendancy from the "time of the wrong," disregarding any intervening events.* In so providing, it may supersede a tribal determination in the administration of tribal property, particularly its distribution among the members of the tribe, *provided, that the determination made by Congress does not offend the notions of "fairness" found to be applicable by a federal district court.* Thus, the United States may assume full control over Indian tribes for the purpose of adjusting rights in tribal property. The assumption of power on the part of the Federal Government to distribute tribal funds and land to the individual members of the tribe required the preparation of payment rolls. Several treaties and statutes have authorized the establishment of such rolls and the pro rata distribution of tribal or public property among the enrollees . . . *However, these treaties and statutes must be considered of doubtful validity in light of the decision in Weeks* v. *Kleppe, and there is serious question whether such statutes will, in the future, withstand the rigid "means-ends" scrutiny to which the Delaware distribution statute was subjected in that case, and upon which it was held void.*

> In addition to its ultimate authority to decide tribal membership, Congress may, as part of its power to administer tribal property, alter the basic rule that tribal property may be distributed only to tribal members, *unless such action is deemed to be repugnant to the "equal protection component" of the Due Process clause of the Fifth Amendment by a federal district court.*

This is not the law of the Constitution today; the decision of the divided court below should not be allowed to make it the law of the Constitution for the future.

No similar statute of the United States, codified in Title 25 of the United States Code, has previously been voided by any Court reviewing the plenary power of Congress over Indian affairs. The substantial public importance of the opinion rendered by the majority below can, thus, hardly be overstated. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 552-553.

2. The majority below refused to consider binding this Court's holding in *Lone Wolf* v. *Hitchcock*, 187 U.S. 550, 565, that "plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . ." The District Court, with a series of quotations from *Baker* v. *Carr*, 369 U.S. 186, 210-211, held that, despite *Lone Wolf*, it would proceed with the caution against the "confusion" which may result from application of the "political question" label (App. p. 28). This was plain error. It cannot be ascribed to inadvertence in the face of Chief Judge Daugherty's quotation from *Lone Wolf* and

his comment that *Lone Wolf* "has not been reversed and the decisions following it are too numerous to cite" (App. p. 82). Nor can the District Court's conclusion withstand analysis of *Baker* v. *Carr, supra. Baker* emphasizes, in its discussion of the various aspects of the "political question" doctrine, that:

> "Our discussion . . . requires review of a number of political question cases, . . . Since that review is undertaken *solely* to demonstrate that neither singly nor collectively do these cases support a conclusion that *this apportionment case* is nonjusticiable, we do *not* explore their implications in other contexts." 369 U.S. at 210. (Emphasis added.)

The only comment in *Baker* regarding Indian legislation was limited to "[t]he *Status* of Indian Tribes," 369 U.S. 186, 215 (emphasis added). The observation expressed was that "while it is for [Congress] . . . not for the courts, to determine when the true interest of the Indian require his release from [the] condition of tutelage . . . 'it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe . . .' *United States* v. *Sandoval*, 231 U.S. 28, 46, 58 L.Ed. 107, 114, 34 S.Ct. 1. Able to discern what is 'distinctly Indian'. . . the courts will strike down any heedless *extension* of that label." *Baker* v. *Carr*, 369 U.S. 186, 216-217, *quoting, United States* v. *Sandoval, supra; quoting, Tiger* v. *Western Investment Company*, 221 U.S. 86, 113. (Emphasis added.)

Appellants have no quarrel with this *dictum*.

It does not need argument to demonstrate that no question of *extension* of the plenary power of Congress to non-Indians is remotely implicated by the present statute, and that the reliance of the majority below upon *Baker* for this *dictum* which, in turn, was derived from *dictum* in *Sandoval, supra*, which in its turn, was derived from *dictum* in *Tiger, supra,* none of which involved an issue at all related to the case at bar was manifestly misplaced.

This Court has not, by holding or implication, suggested that the mass of federal case law built upon *Lone Wolf* v. *Hitchcock* was impliedly overruled by *Baker* v. *Carr*, or any other decision. Quite the contrary. By its emphasis upon what was *not* decided in *Baker* v. *Carr*, see *supra*, 369 U.S. 186, 210, this Court was at pains to negate any such implication.

The action of the majority below in disregarding this express limitation, and treating *Baker* as authority for a question it was at pains not to decide, was plainly improper and should be reversed.

At all events, if the holding of *Lone Wolf* v. *Hitchcock* is no longer to be considered controlling law in the federal courts, this Court should set forth the parameters of the rule which will replace it. The assertion of the court below that "case-by-case inquiry" is sufficient in this context (App. p. 28), is untenable. The plenary power of Congress to enact Indian legislation should not be allowed to rest upon the composition of the majority of a three-judge District Court for a particular district. This is especially true since the published precedent of the court below will, if unreversed, have controlling effect in the Western District

of Oklahoma, where a substantial number of Indian tribes, subject to federal statutes reside, and persuasive effect throughout the Tenth Circuit, in which a majority of the Indian tribes in the United States reside.

3. The majority below held that: "the effect of the statute is to create subclasses which are treated unequally . . ." in violation of the Due Process Clause and was, therefore, void (App. p. 43).

The extraordinary importance of this holding, and the magnitude of the error committed by the District Court, is apparent from the District Court's further holding that: "We grant no relief against the Tribes [*i.e.*, the defendant subclasses] or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them. . . " ! (App. p. 27).

This sleight of hand was performed by a majority determined to disregard the holdings of this Court in *Morton* v. *Mancari*, 417 U.S. 535 and *United States Fidelity and Guaranty Company*, 309 U.S. 506.

Morton v. *Mancari*, 417 U.S. 535, 553 n. 24, expressly warned against equating "a 'racial' group consisting of 'Indians' . . . [with] members of 'federally recognized' tribes." *Id.* The *Mancari* Court also reaffirmed "the unique legal status of Indian tribes under federal law . . ." 417 U.S. 535, 551. The District Court ignored the point upon which *Mancari* turned through an improper use of the class action procedures of Rule 23, Fed.R.Civ.P. This misuse of the procedural device of a class action to obtain a substantive result was compounded by employing the same device

to evade the mandate of *United States* v. *United States Fidelity and Guaranty Company, supra.*[14] In words as clear as the English language permits, this Court held in *United States Fidelity and Guaranty Company* that "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without congressional authorization." 309 U.S. 506, 512-513. The court below reduced this holding to a form of words by the device of entering a declaratory judgment against individual members of the Tribe as "representatives" of the Tribe and tribal business committee, *i.e.*, the court-created "Absentee Delaware subclass" (App. p. 27). This evasion of the authority of *United States Fidelity and Guaranty Company* should be reversed. The decision below is flatly irreconcilable with *United States Fidelity and Guaranty Company's* holding that Indian Tribes are exempt from suit without congressional authorization and is an abuse of the procedural device of a class action to obtain an otherwise impermissible substantive result. See, *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156, 177-178.

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[14]The court below stated that no objection was raised to class action procedure (App. p. 10). This is misleading. Appellants filed numerous objections to the jurisdiction of the court, both as to subject matter jurisdiction and upon immunity grounds. The court so admitted (App. pp. 24, 27). Until the court's opinion was handed down, the court had, in no way, intimated that any of these carefully-pleaded objections were to be "resolved" by Rule 23, Fed.R.Civ.P. Again, the record is, as the court admits, replete with objections on the grounds, for the reasons, and upon the authorities cited in this Jurisdictional Statement (App. pp. 24, 27).

The decision below is also irreconcilable with the explicit holdings of the Tenth Circuit in *Tewa Tesuque* v. *Morton*, 498 F.2d 240, 241-242 (10th Cir. 1974), *affirming*, 360 F.Supp. 452 (D. N.M. 1974); *National Indian Youth Council* v. *Bruce*, 485 F.2d 97 (10th Cir. 1973); *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); and *Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957). If unreversed, it is the vehicle which any "unincluded" group of any Indian tribe within the jurisdiction of the Tenth Circuit, and certainly within the jurisdiction of the Western District of Oklahoma may use to urge that any Act of Congress which concerns any particular tribe is to be vitiated for "underinclusiveness," and that long-settled principles of federal Indian law are to be disregarded. A state of affairs will exist within the Tenth Circuit in which the plenary power of Congress to enact Indian affairs legislation will depend upon the composition of a particular three-judge court and whether a majority of that panel chooses to follow the decision below or, *per contra*, the decisions of four unanimous panels of the Tenth Circuit, differently constituted, which handed down the flatly contrary decisions in *National Indian Youth Council* v. *Bruce*, *supra*; *Tewa Tesuque* v. *Morton*, *supra*; *Groundhog* v. *Keeler*, *supra*; and *Martinez* v. *Southern Ute Tribe*, *supra*. The potential for irreconcilable results in cases of great federal importance, depending upon the predilections of the composition of a panel of the Tenth Circuit—or of a three-judge District Court sitting within the Tenth Circuit—is obvious without further argument, as is the necessity for this Court to prevent such a situation by plenary consideration of the questions here presented.

If this Court's holdings are to be overruled, that is a function for this Court alone. But this Court's decisions should not be allowed to be evaded by indirection or by a lower court decision which gives lip service to the form, but ignores the substance, of its holdings. In any event, in an area where Congress' power is plenary, a state of affairs in which the validity of all federal Indian legislation depends upon the composition of a particular three-judge panel is manifestly untenable. See, *Hicks* v. *Miranda*, 422 U.S. 332, 344-345. As in *Hicks*, so here, the district courts are bound by this Court's decisions "until such time as the Court informs [them] that [they] are not. . . ." 422 U.S. at 345, and, as in *Hicks*, the disregard shown for this Court's holdings by the majority below should be reversed, and the authority for this Court's prior opinions reaffirmed.

4. The degree of error in the District Court's substantive misuse of Rule 23 is manifested by its treatment of Section 4 of the statute, 86 Stat. 762, 763, 25 U.S.C. Section 1294(a). This section directs that ten per cent of the funds be distributed to the *tribal governing body* of the Absentee Delaware Tribe of Western Oklahoma for tribal purposes.

Consistently with *United States* v. *United States Fidelity and Guaranty Company, supra; Martinez* v. *Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957); *Fondahn* v. *Native Village*, 450 F.2d 570 (9th Cir. 1971); and *Baciarelli* v. *Morton*, 481 F.2d 610 (9th Cir. 1973), appellants moved for Partial Final Judgment, Fed.R.Civ.P. 54(b), as to these funds. The motion was denied. The District Court held that 86 Stat. 762, 763, 25 U.S.C. 1291-1297 was void and, without

more, struck this section down (App. p. 22-23, n. 20). This holding—that legislation programming funds from the Federal Treasury *to the Tribe itself* may be vitiated by an injunction upon the complaint of a private party—is so grossly in error that it, alone, requires review and reversal by this Court.

The District Court cited no precedent for its holding, despite its obvious magnitude and its importance for the administration of federal Indian law. This is understandable. There is no precedent. This case should not be allowed to become the first. The importance of this issue to all Indian Tribes which receive tribal program money cannot be exaggerated. Plenary review and unequivocal reversal by this Court are necessary if the orderly administration of tribal governmental expenditures is not to be thrown into a welter of disruptive litigation and conflict. See, *e.g.*, *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); *United States* v. *United States Fidelity and Guaranty Company*, *supra*.

5. The majority below held 86 Stat. 762, 763, 25 U.S.C. Sections 1291-1297 void because it excluded from its provisions certain persons who argued that they could prove, by ethnological evidence, that they were descendants of persons who had been members of the Delaware Tribe in 1854—the "time of the wrong" for which the Claims Commission judgment was entered (App. pp. 37-41). The court below, in accepting this assertion as ground for voiding the statute held, in effect, that any statute which might replace 86 Stat. 762, 763—or any other judgment statute—*must* allow for an *individualized* hearing for every individual

who alleges ancestry from the ancient Tribe. This holding is inconsistent with the Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 776-785, that requiring "individualized determinations" or "an individualized hearing" as to a non-contractual statutory benefit "would represent a degree of judicial involvement in the legislative function which we have eschewed, except in the most unusual circumstances, . . ." *Id.* at 773. No such "unusual circumstances" are presented here, and the holding of the majority below that the statute at bar is repugnant to the Due Process Clause because it excludes some persons who might prove that they are, ethnologically, descendants of the ancient Delaware Tribe, plainly conflicts with *Salfi's* holding that: "[w]hile it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships [or claims], and of relying on a rule which may not exclude some obviously sham arrangements [or claims], we think it clear that Congress could rationally choose to adopt such a course." 422 U.S. at 781. The statute in the case at bar, like the statute in *Salfi*, does not involve "affirmative governmental action which seriously curtails important liberties cognizable under the Constitution." Both this statute and the statute at issue in *Salfi*, involve only "a non-contractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status, . . ." 422 U.S. at 722, and as to which there is "no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional

concern which they might be expected to produce." 422 U.S. at 785.

The magnitude of the error committed by the majority below in refusing to reach a result in accord with the result this Court reached in *Salfi, supra*, is enlarged by the fact that the decision below calls into question a longstanding substantive policy of Congress in regard to the proper interpretation of the Indian Claims Commission Act itself. That interpretation, *expressly* put before Congress in the legislative hearings which preceded enactment of the statute held void by the District Court, is that: "the Indian Claims Commission Act *requires* that awards be made, *not* to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today." *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 266-268, 315 F.2d 906, 913-914 (1971). (Emphasis added.)

In an extraordinary exercise, the majority below quoted this holding and then proceeded to disregard it, apparently (the opinion is none too clear) on the ground that subsequent Court of Claims decisions *may* have modified the rule of *Minnesota Chippewa Tribe*, insofar as *intervention before the Indian Claims Commission itself is concerned*, and, therefore, the rule of *Minnesota Chippewa Tribe* was irrelevant (App. p. 45).

This was a grave error and one of substantial importance for *all* future Indian Claims Commission Act judgment statutes. The decision of the District Court disregards the elementary point that, until entry of the judgment below, no one had suggested that Congress *could not* elect to follow the reasoned interpretation of the Indian Claims

Commission Act set forth in *Minnesota Chippewa Tribe* v. *United States, supra, if Congress so chose.* As Chief Judge Daugherty correctly observed, all courts, including the Court of Claims, have consistently recognized that "how the award is to be paid and precisely who can participate . . . are questions for Congressional and administrative determination." App. p. 85, *quoting, Snoqualmie Tribe* v. *United States*, 178 Ct.Cl. 570, 372 F.2d 951, 957 (1967).

The effect of the decision below is to say that Congress *cannot*, by force of the Constitution, follow the rule laid down in *Minnesota Chippewa Tribe* v. *United States.* Rather, Congress must adopt a Procrustean rule of "but for" causation which conclusively presumes that money payable to a named Indian Tribe as of a date certain, but not in fact paid, would have been in the tribal treasury, rather than expended for some other purpose, a decade or more after the money should have been paid into the tribal treasury. If this sentence seems awkward, it is. But it is the only way in which the remarkable holding of the majority below may be set forth. To illustrate the holding below, we very briefly set forth the facts of the claim here at issue: These are funds which would have been paid to the Delaware Tribe in 1854 *if* the Treaty of 1854 between the United States and the Delaware Tribe had been fair. The holding of the District Court requires Congress to *presume* that these *same* funds would still have been in the Delaware treasury twelve years later, in 1866, when the ancestors of the plaintiff class resigned from the Tribe and took their pro rata share of the tribal assets. The holding below requires Congress to indulge this presumption despite the fact that the 1854 Treaty itself contemplated

expenditure of any and all funds which the Tribe might receive pursuant to its terms, at any time from 1854 forward.[15]

The holding below will, if unreversed, establish the predicate for voiding scores of congressional judgments under the Indian Claims Commission Act heretofore thought wholly consistent with the Due Process Clause. It is an invitation for ethnological splinter groups of any Indian tribe to void an Act of Congress which does not include them within its provisions, even when, as here, they are descendants of a group who formally renounced their tribal citizenship and resigned from the Tribe. Under such a rule, the holding of *Minnesota Chippewa Tribe, supra*, is turned on its head, and *no* statute is constitutionally valid unless it expressly *includes* "individual descendants of tribal members at the time of the taking" !

Under such a rule, the congressional policy of self-determination for American Indian Tribes,[16] as the tribal entities exist today, would be jeopardized. The effect of the injunction below on the portion of the judgment money which was programmed directly *to the tribal governing body itself* is sufficient evidence of the fact. It is equally sufficient evidence of the importance of the question, and of the necessity for plenary review in this Court.

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[15]Article VIII of the Treaty, 10 Stat. 1048, 1051, provided:

> ". . . Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem just and proper."

[16]See, 88 Stat. 77, 25 U.S.C. 1451 and 1452.

6. "*How much* rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs?" (App. p. 89). (Emphasis added.) That crucial question, asked by Chief Judge Daugherty, went unanswered. Judge Daugherty's dissent correctly stated: "Assuming some rationale must be present . . . there is in any event an abundance shown by the record" (App. p. 89). This statement is, we submit, indisputable. Judge Daugherty analyzed the record and observed:

> "Congress had before it another Bill which would have distributed CD 72 and 298 [88 Stat. 762, 763, 25 U.S.C. 1291-1297] funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337 [82 Stat. 861-862, 25 U.S.C. 1181-1186]. *Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls.*" (App. p. 89). (Emphasis added.)

Judge Daugherty noted the obvious: these facts are surely sufficient to easily demonstrate a rational basis in the record to support the congressional judgment embodied in the statute challenged here (App. pp. 89-90).

But the majority below held the statute at bar to an extraordinarily stringent standard of review. The majority eliminated each of the several proffered—and demonstrated—bases for upholding this statute by demanding rigorous empirical proof that each proffered basis fitted so perfectly with the statutory goals as to eliminate any possible "underinclusion." Not surprisingly, when held to such a standard as that demanded by the majority, the statute was unable

to survive; any judgment statute, other than (perhaps) a pure lineal descendancy statute would have fallen before such an intense standard of "means-ends" review.

For example, the admitted necessity of finding a method of distribution which would avoid the turmoil created by the lineal descendancy provision in the 1968 Delaware judgment statute (82 Stat. 861, 862, 25 U.S.C. 1181-1186), properly described by Chief Judge Daugherty as "horrendous" (App. p. 89), was dismissed by the majority "in view of the admonition of *Stanley* v. *Illinois*, 405 U.S. 645, 656 . . ."! (App. p. 41). The right of a father to a hearing in a child custody proceeding—the issue in *Stanley*—is a far cry from the case at bar, and the reliance upon it is obviously misplaced.

The need to eliminate spurious claims, held to be a decisive governmental interest in *Salfi, supra*, was dismissed on the authority of the singularly ill-favored classification contained in *Jimenez* v. *Weinberger*, 417 U.S. 628, 636, and the gender-based classification in *Reed* v. *Reed*, 404 U.S. 71. The court simply assumed that appellees' constitutional claim under the Due Process Clause was *within* the umbrella of such demanding review as that applied in *Shapiro* v. *Thompson*, 394 U.S. 618, and *Goldberg* v. *Kelly*, 397 U.S. 254 (App. p. 52).

The majority below, applying without heed to Chief Judge Daugherty's powerful dissent, a rigorous standard of strict empirical review, disclaimed, as a matter of form,[17]

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[17]The majority's disclaimer to the effect that it was not applying "strict scrutiny" here should be disregarded. Though claiming not to do so, that, obviously, is what the majority did; a fact sufficiently shown by the cases upon which the majority relied (App. pp. 41, 43, 52).

what it was doing as a matter of substance: subjecting this statute to a standard of review which no statute, state or federal, has yet survived.

Even assuming, *arguendo*, that equal protection review is appropriate to a closed-end distribution statute such as the one at bar, under tradition equal protection standards the statute easily meets the requirement of having "some reasonable basis," *Dandridge* v. *Williams*, 397 U.S. 471, 485, and of drawing lines of distinction based upon a "state of facts [which] reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (citations omitted).

Indeed, in dealing with so extraordinarily complex a question as an acceptable vehicle for judgment legislation to pay for a wrong committed a century and a quarter ago against a group of people long since dead, *Cf. Northwestern Shoshone Tribe* v. *United States*, 324 U.S. 335, 354 (Jackson, J. concurring), the admonition of *Jefferson* v. *Hackney*, 406 U.S. 535, 546-547, that "the very complexity of the problems suggests there will be more than one constitutionally permissible method of solving them" is especially appropriate.

The court below, holding irrelevant the history of enormous problems of fairness, and the administrative chaos, that came in attempting to distribute the 1968 Delaware judgment on an ethnological basis, commanded that Congress justify its policy decision in the 1972 judgment statute with a legislative history so completely convincing and a statutory plan so precisely crafted as to result in no possible "underinclusion." Of course, the judgment statute

subjected to such unprecedented review was unable to bear the enormous burden put upon it; the statute should not have been called upon to bear that burden.

The standard of review to which the majority held the statute at bar directly conflicts with the carefully restrained standard employed in *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 813-814, *affirmed*, 384 U.S. 209. The issues presented to the court below are legally indistinguishable from those presented in *Simmons*. The statute here, like the statute in *Simmons*,[18] served the purpose of providing a statutory definition of those who would be considered members of a tribal group for a particular purpose.

The majority below made no attempt to reconcile its holding with the *Simmons* holding that:

> "It was early held that included in this plenary power of Congress [over Indian affairs] was the power to *regulate and define tribal membership*. In short, Congress, or its delegated agents, had full power to define and describe those persons who would be *treated and regarded as members* of an Indian Tribe and entitled to an enrollment therein." 244 F.Supp. 808, 813 (emphasis added; footnotes omitted).

In support of its holding, the *Simmons* court cited and discussed no less than eleven decisions of this Court. The majority below erred in limiting the broad holding of *Simmons* to its precise facts. The majority below compounded the error by refusing even to discuss its reasons for limiting

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[18]The statute at issue in *Simmons* was, 60 Stat. 968, 25 U.S.C. 607. The statute defined "membership" in the Yakima Tribes on the basis of "enrolled members . . . ." and limited descendable interests from deceased members of the Tribe to those persons defined in the statute.

Simmons to its facts. This error should be reversed. *Cf. Hicks* v. *Miranda*, 422 U.S. 332, 343-344.

The standard of review applied in *Simmons* was that "at some reasonable point a line must be drawn between . . . those properly to be regarded as continuing members of the Tribe [for purposes of the statute at issue] and those who are not." 244 F.Supp. 808, 814. That standard was affirmed by this Court, 384 U.S. 209. Under this criteria for reasonable deference to congressional judgment, there is "an abundance [of rationality] shown by the record" (App. p. 89). (Daugherty, J., dissenting.)

A substantial question affecting the continuing validity of much federal Indian law is presented by the conflict between the carefully restrained standard of review invoked in *Simmons*, and the demand for rigorous empirical justification demanded by the holding of the majority below. This Court should resolve the conflict, and reverse the judgment below.

7. Appellees' complaint alleged, *inter alia*, that the effect of the statute here at issue was to take their property, *i.e.*, the fruits of a cause of action, without just compensation. The District Court, reaching the merits of this claim, rejected it (App. pp. 64-66).

Appellants properly raised with the court below, and briefed at length, the question whether appellees' exclusive remedy (assuming, of course, that their allegation could be proven) lay in the Court of Claims pursuant to the statutory scheme set forth in 25 U.S.C. § 1491 and 25 U.S.C. § 1505. A substantial constitutional question is presented by the action of the District Court in reaching the *merits*

of this claim (even though it was decided against appellees). See, *Hurley* v. *Kincaid*, 285 U.S. 95, and, *Regional Rail Reorganization Act Cases*, 419 U.S. 102.

CONCLUSION

It is earnestly submitted that the action of the majority below in striking down this Act of Congress fails to recognize the authority of controlling decisions of this Court, that the unprecedented holding below presented questions of great constitutional importance in federal Indian law, and that these questions can only be authoritatively decided upon plenary review by this Court.

Respectfully submitted,

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March, 1976

APPENDICES

APPENDIX A

FILED
DEC 18 1975
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,
Defendant,

THE DELAWARE TRIBE OF INDIANS, and
The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).
Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington, D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City, Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

JUDGMENT

Pursuant to the findings of fact and conclusions of law appearing in the opinion of the court it is ordered, adjudged and decreed as follows:

1. That this judgment, together with the court's opinion expressing its findings and conclusions, shall determine the rights between the parties to these actions and between the plaintiff Kansas Delaware class, and the defendant Cherokee Delaware class and the defendant Absentee Delaware class, as defined in the court's order entered November 18, 1974, approving forms of class action notice and procedures for giving notice, and the court's orders entered November 1 and 4, 1974, pertaining to class action procedures;

2. That Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, is hereby declared valid and constitutional; that the preliminary injunction entered on March 21, 1974, in Civ-73-586-E, Wanda June Weeks v. United States of America, et al, is vacated as to all restraint against distribution by the defendant Secretary of the Interior, his agents and employees, of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Docket No. 337, and the increments of interest thereon; and that all relief sought by the plaintiffs and the plaintiff Kansas Delaware class in these actions pertaining to said statute, award and judgment funds is denied;

3. That it is adjudged that the provisions of Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, are valid insofar as they provide for the inclusion of the defendant Cherokee Delaware class and the defendant Absentee Delaware class in the distribution of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Dockets Nos. 72 and 298; that, however, said statute makes irrational, arbitrary and unconstitutional classifications for the distribution of said judgment funds in violation of the

Due Process Clause of the Fifth Amendment to the United States Constitution by invalidly excluding therefrom the plaintiff Kansas Delaware class; that the portions thereof making the unconstitutional classifications and exclusion are not severable from the remainder of said statute; that, therefore, the invalid provisions of said statute render it invalid, void, and unenforceable as a whole, as presently enacted; that the judgment funds appropriated to satisfy said award in Dockets Nos. 72 and 298 and the increments of interest thereon are under the control of the Defendant Secretary of the Interior and required to be dispersed and credited pursuant to said distribution statute, unless equitable relief is granted; and that, therefore, the defendant Secretary of the Interior, his agents and employees are enjoined and restrained from distributing and crediting any of the judgment funds appropriated to satisfy said award under the provisions of 25 USCA §§ 1291-1297, and the increments of interest thereon, it being provided that such restraint shall continue only to and until an amendment of the distribution provisions of said statute is enacted and approved, or until a further statute providing for distribution of said funds is enacted and approved.

4. That all other relief sought by the pleadings and motions of the parties, and which is not granted by this judgment, is denied.

s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

ENTERED IN JUDGMENT DOCKET ON DEC. 18, 1975

By: Adelaide Holston, Deputy

[APPENDIX]

FILED
DEC 18 1975
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crowe; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner, Defendants,	No. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of	No. CIV-74-368-D

the Interior of the United States of America,

Defendant,

THE DELAWARE TRIBE OF INDIANS, and The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe, on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class.).

Intervenors.

Delmer L. Stagner and Stephen P. Friot, Oklahoma City, Oklahoma (Halley, Spradling, Stagner & Alpern, Oklahoma City, Oklahoma, and Henry B. "Boots" Taliaferro, Jr., of Casey, Lane & Mittendorf, Washington D. C., of counsel, on the briefs) for Plaintiff Weeks

John G. Ghostbear, Tulsa, Oklahoma, for Plaintiffs Frazier and Rattler

Duard R. Barnes, Assistant Solicitor of Indian Affairs, United States Department of Interior, Washington, D. C., and Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma on the briefs) for Defendant Secretary of the Interior

Bruce Miller Townsend, Tulsa, Oklahoma, and Clyde J. Watts, Oklahoma City, Oklahoma (Watts, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, on the briefs) for Defendant and Intervenors, The Delaware Tribal Business Committee, et al

Granville Tomerlin and B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (Tomerlin, High & Patton, Oklahoma City,

Oklahoma, on the brief) for Defendant The Absentee Delaware Tribe of Oklahoma Business Committee

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Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and EUBANKS, District Judge, Western District of Oklahoma

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Memorandum Opinion by Holloway, Circuit Judge, in which Eubanks, District Judge, Western District of Oklahoma, joins; Daugherty, Chief Judge, Western District of Oklahoma, concurs in part and dissents in part

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MEMORANDUM OPINION

These suits challenge the constitutionality of two federal statutes. The first, Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, determines the Indian descendants who may participate in the distribution of an Indian Claims Commission award redressing a wrong by the United States under an 1818 treaty with the Delaware Tribe. 7 Stat. 188.[1] The second statute, Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, performs the same function for a separate Indian Claims Commission award redressing a breach by the United States of an 1854 treaty with the Delawares. 10 Stat. 1048.[2]

Three classes of Delaware Indian descendants are represented by the parties in these cases. The plaintiffs represent a group known as the Kansas Delawares. The defendants represent two groups of descendants known as the Cherokee Delawares and the Absentee Delawares.

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[1]The Indian Claims Commission findings and conclusions in Docket No. 337 concerning the wrong under this 1818 Treaty are reported at 9 Ind. Cl. Comm. 346.

[2]The Indian Claims Commission findings and conclusions in Dockets Nos. 72 and 298 concerning the wrong under this 1854 Treaty are reported at 21 Ind. Cl. Comm. 344.

[APPENDIX]

In 25 USCA §§ 1181-86, relating to the 1818 wrong, Congress devised distributive classifications that permitted descendants in all three classes to share in the award. Invoking the Fifth Amendment Due Process Clause and equal protection principles incorporated by it, and the Just Compensation Clause, the Kansas Delawares challenge the constitutionality of the statute's inclusion of the Cherokee Delawares in these distribution provisions.

In 25 USCA §§ 1291-97, relating to the 1854 wrong, Congress provided distributive classifications that permitted only the Cherokee Delawares and the Absentee Delawares to share in the award. With respect to this statute, the Kansas Delawares challenge the constitutionality of (1) their exclusion from the distributive provisions, specifically under the Due Process Clause and equal protection principles incorporated by it, and under the Just Compensation Clause, and (2) the inclusion of the Cherokee Delawares and Absentee Delawares, invoking the same Fifth Amendment principles.

Plaintiffs seek declaratory, injunctive and mandamus relief against distributions under both statutes.

We find merit in plaintiffs' challenge to 25 USCA §§ 1291-97 as an irrational classification, insofar as the statute excludes the plaintiff class of Kansas Delawares[3] from

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[3]The Kansas Delaware class is reported to be composed of over 600 members (plaintiff Weeks' report on membership filed February 4, 1975). As of February, 1975, it was reported that notification by mail of 496 Kansas Delawares had been achieved (plaintiff Weeks' affidavit of service of notice of class action filed February 26, 1975).

The report to the court on membership of the Kansas Delaware class filed February 4, 1975, states that presently ascertained members whose identities are known total 636. In addition, the February 26, 1975, affidavit of plaintiff Weeks states that, upon receiving additional information from the Secretary as to identities and addresses of additional Kansas Delawares, approximately 42 additional persons were mailed notice, making a total of 678 Kansas Delawares who have been identified.

participating in the distribution of the award in Indian Claims Commission Dockets Nos. 72 and 298, relating to the 1854 wrong, and enjoin the defendant Secretary of Interior from making distribution of funds thereunder. We reject all other contentions of the Kansas Delawares concerning the validity of that statute.

We do not sustain the plaintiff Kansas Delawares' challenge to 25 USCA §§ 1181-86, relating to the 1818 wrong, and vacate the preliminary injunction restraining distribution of the remaining funds of the award in Indian Claims Commission Docket No. 337 redressing that wrong.

The plaintiff Weeks in No. Civ. 73-586-E filed her complaint alleging that this court has jurisdiction of this action "under Article III, Section 2 of the Constitution of the United States, under 28 U.S.C. § 1331 and § 1132, and 5 U.S.C. § 701 et seq." (Complaint para. 14). This three-judge court was convened to hear the case. After an evidentiary hearing we entered a preliminary injunction enjoining the defendant Secretary from distributing any of the funds held by him that were appropriated by Congress to satisfy the judgments in Indian Claims Commission Docket No. 337, dealing with the 1818 wrong, and Dockets Nos. 72 and 298, dealing with the 1854 wrong (with specified limited exceptions agreed to by all parties), pending the final determination of this action.

Plaintiffs Frazier and Rattler in No. Civ. 74-368-D filed their complaint in the Northern District of Oklahoma. Because this case involves substantially the same parties and subject matter, it was transferred to this district and consolidated with No. Civ. 73-586-E pursuant to Rule 42(a) F.R.Civ.P. The same panel was constituted to hear it.

This court sustained a motion to dismiss of the United States on the ground that the action as against the Government was an unconsented suit. Other motions to dismiss and for summary judgment were denied and we certified the

action as against the remaining defendants to proceed as a class action by plaintiff class, the Kansas Delawares, against, *inter alia*, defendant classes, the Delaware Tribe of Indians (the Cherokee Delawares) and the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delawares).[4] No question is raised as to the propriety of the class action procedure.

We will discuss the issues under the following propositions: (1) the historical background; (2) jurisdiction and justiciability; (3) validity of the statutory exclusion of the Kansas Delawares from distribution of the award redressing the 1854 wrong; (4) validity of inclusions of the Cherokee Delawares in distribution redressing both the 1818 and 1854 wrongs, and of the inclusion of the Absentee Delawares in distribution redressing the 1854 wrong;[5] and (5) equitable jurisdiction and remedies. This opinion will constitute our findings and conclusions pursuant to Rule 52, F.R. Civ.P.[6]

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[4]Class action representation in this suit is proper under Rule 23(b)(1)(B) and Rule 23(b)(2), F.R.Civ.P., since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, and since the defendant Secretary and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

[5]As noted, the plaintiff Kansas Delawares do not challenge the inclusion of the Absentee Delawares in distribution of the award redressing the 1818 wrong.

[6]There were numerous objections to the many exhibits offered in evidence at trial. We are citing those exhibits relied on in reaching our findings and conclusions and deny objections to the cited proof. Otherwise it is unnecessary to express evidentiary rulings.

I

THE HISTORICAL BACKGROUND

The Delaware Indians were originally on the eastern seaboard, but by the second decade of the 19th century they were geographically scattered. One group of Indians of Delaware ancestry, the Munsee Indians, had become associated with the Moravian Indians, later known as the Christian Indians, or Christian Munsees, and had settled in Canada. Other Munsees were living with the Stockbridge in New York. This group became known as the Stockbridge Munsee. By 1818, the nucleus of the Delaware Nation was residing principally in Indiana and Ohio. See Senate report accompanying H.R. 16402, S. Rep. No. 1518, 90th Cong., 2d Sess. 8, which contains an historical outline of the Delaware Tribe and the various groups involved here. (Defendants Secretary and Cherokee Delawares' Ex. 4, hereinafter cited as Senate Report).

Several years earlier, in 1793, the Spanish Government had granted a tract of land in Missouri to certain bands of the Delawares in Indiana and Ohio who wished to move beyond the Mississippi. A number of the Delawares moved to this grant, and later, on to Arkansas, Oklahoma and Texas, but the main body of the Tribe remained behind until the Treaty of St. Mary's was made in 1818, 7 Stat. 188 (Findings of fact No. 4 and 47, Ind. Cl. Comm. Docket No. 337, *supra* n. 1, Pl. Ex. 10, Tabs A and P).

Under this 1818 treaty, the Delawares ceded to the United States all their lands in Indiana,[7] and in return the United States agreed to give them land west of the Mississippi (Art. 1, 2). It appears that no Christian Munsees and only some of the Stockbridge Munsees were in residence with the main body of the Delaware Tribe at the time the Indiana lands were ceded by the 1818 Treaty (Senate Report, *supra*, at 8-9).

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[7]The remaining Delaware lands in Ohio were ceded to the United States by separate treaties. No claim concerning those lands is involved here.

The Delawares moved to the Missouri tract where they remained until 1829. In September of that year, the Delawares entered into another treaty with the United States, which was designated as a "supplemental article" to the 1818 Treaty. 7 Stat. 327. Under the terms of this supplemental treaty the Delawares gave up their temporary residence in Missouri and accepted in lieu thereof, as their permanent residence, a reservation in Kansas. This reserve was part payment for the Delaware cession of the Indiana lands, and purported to satisfy the obligation of the United States under the 1818 Treaty to provide the Delaware Nation a permanent home west of the Mississippi (Findings of fact 5 and 6, Docket No. 337). But the trade was grossly unequal. The disparity in value between the Indiana lands ceded by the 1818 Treaty and the Kansas lands received under the 1829 Treaty later became the basis for the judgment rendered by the Indians Claims Commission in Docket No. 337. The statute distributing this award, 25 USCA §§ 1181-86, is one of the two distribution statutes being challenged in this suit.

After the Treaty of 1829 many of the Delawares that had preceded the Tribe into Missouri, and then into Arkansas, Oklahoma and Texas, moved on to the land assigned to them in Kansas. A portion of the members of the Delaware Tribe, however, remained in sections of Oklahoma and Texas. One group of Delawares, on its way from Texas to Kansas in 1853, obtained permission from the Choctaw Nation in the Anadarko area of Oklahoma to stay on its land as tenants at will (Finding of fact No. 48, Docket No. 337). Some of this group subsequently moved to the Kansas Reservation, but the majority remained behind in Oklahoma. These Delawares, together with others from Kansas and elsewhere that later joined them, maintained group identity, having chiefs and a tribal council up to the present time. The descendants of this group, who are now residing among the Wichita and Caddo Indians at Anadarko, Okla-

homa, comprise the defendant class, the Absentee Delaware Tribe of Western Oklahoma, or Absentee Delawares (Finding of fact No. 51, Docket No. 337).

On May 6, 1854, the main body of the Delaware Tribe residing on the Kansas lands entered into a treaty with the United States, 10 Stat. 1048. Under this treaty which was not signed by any representatives of the Absentee Tribe (Defendants' Adm. No. 37, Pl. Ex. 154), the Delawares ceded their lands in Kansas, with certain exceptions, to the United States. These lands comprised the so-called hunting "outlet," extending westward into mid-Kansas, and the "residence lands" (Finding of fact No. 2, Ind. Cl. Comm. Dockets Nos. 72 and 298, *supra* n. 2, Pl. Ex. 10, Tab Q). Of the residence lands, part was reserved to the tribe as a permanent home (Art. 1), and four sections were to be conveyed to the Christian Indians who had since migrated to Kansas and were living with the Delawares in 1854 (Art. 13; Senate Report, *supra*, at 10). The remaining portion of the residence lands, the Delaware "trust lands", was ceded to the United States to be sold at public auction, with the proceeds going to the Delaware general tribal fund (Art. 2, 7); Finding of fact No. 2, Dockets Nos. 72 and 298).

However, in 1856 and 1857 the Government improperly sold the Delaware trust lands. It did not sell the lands at public auction as required by Article 8 of the 1854 Treaty, and as a result the Delawares received far less than they should have from the sale of their lands. (Findings of fact No. 4 and 8, Dockets Nos. 72 and 298). At this time ancestors of the plaintiff Kansas Delawares and of the defendant Cherokee Delawares were residing on Delaware lands in Kansas. The wrongful disposition of the Delaware trust lands in Kansas became the basis for the judgment rendered by the Indian Claims Commission in Dockets Nos. 72 and 298, and underlies the other distribution statute challenged herein, 25 USCA §§ 1291-97.

[APPENDIX]

Pursuant to the Treaty of 1854, the Delawares removed to that portion of the residence lands which the treaty had reserved for them as a permanent home (the "diminished reserve"). Then, by a treaty in 1860, 12 Stat. 1129, the United States agreed to survey the diminished reserve and to allot to each Delaware Indian an 80-acre tract in that reserve (Art. I). In addition, the treaty provided that 80-acre tracts were to be set aside for each of certain Absentee Delawares, approximated to be 200 in number, who were expected to move to Kansas and reassemble with the main body of the tribe in the near future (Art. IV).

In 1866 the Delawares entered into another treaty with the United States, 14 Stat. 793, the purpose of which was to provide for their removal to Indian Country in Oklahoma. The diminished reserve was to be sold by the United States, with the proceeds to be used for the purchase of 160 acres of land in the Indian Country for each Delaware man, woman and child who should remove thereto (Art. IV). However, all adult Delawares were to be given the opportunity under the treaty to elect whether to remove or, instead, to dissolve their relations with the Delaware Tribe and become citizens of the United States (Art. III). Each adult Delaware who thus elected to become a United States citizen was to receive fee simple title to the 80-acre tract allotted him under the 1860 Treaty, his just proportion of the Tribe's credits then held in trust (which included the proceeds of the sale of the trust lands), and also his proportion of the proceeds of the sale of the diminished reserve. Thereafter these persons were to share no further in Delaware property or annuities (Art. IX).[8]

The 1866 Treaty also provided that a registry would be made of the names of all the Delawares who thus elected to dissolve their tribal relations and remain in Kansas (Art. IX). The names of 21 adults and 49 minors appear on such

[8]Article IX of the 1866 Treaty is reproduced in Part C of the Appendix to this opinion.

registry (Pl. Ex. 44). They are the ancestors of the plaintiff class Kansas Delawares.[9]

In July, 1866, the United States and the Cherokee Nation made a treaty which provided for the relocation of civilized Indians on unoccupied Cherokee lands in the Indian country in Oklahoma. Art. IX, 14 Stat. 799. By an agreement in 1867 between the Delawares and the Cherokees (Pl. Ex. 10, Tab I), each individual of the Delaware Tribe who enrolled upon a certain register[10] acquired a life estate of 160 acres of land from the Cherokees (see Delaware Indians v. Cherokee Nation, 193 U.S. 127, 143), paid for by tribal funds,[11] and the right to become members of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and

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[9]Wanda June Weeks, the plaintiff in No. Civ. 73-586-E and representative of the plaintiff class in this consolidated action, established that she is a lineal descendant of one of the original Kansas Delaware Indians. One of the names appearing on the "Article IX Register" is Annie Grinter (Pl. Ex. 44). Annie Grinter was the great-grandmother of Wanda June Weeks (Transcript of Preliminary Injunction Hearing, 20 Pl. Ex. 15; Pl. Ex. 136a). Dorothy Frazier and Ruth Rattler, the plaintiffs in No. Civ. 74-368-D, alleged lineal descendancy through a Kansas Delaware named Lewis Ketchum (Plaintiffs Frazier and Rattler's Complaint, para. 5; Pl. Ex. 44), and established that they shared in the partial distribution of the award in Docket No. 337 (Pl. Ex. 136c and d).

[10]The names of 985 Delawares appear on this register (Defendants Secretary and Cherokee Delawares' Ex. 23, p. 73, 241. They are often referred to as "registered Delawares." The register is referred to as the "1867 Register."

[11]As noted, the 1866 Treaty, 14 Stat. 793, provided that the United States would use the proceeds from the sale of the diminished reserve to purchase the Cherokee lands (Art. IV). Actually, only the lands not allotted to the Kansas Delawares were to be sold.

The diminished reserve consisted of land which was held in severalty in 80-acre allotments and land held in common by the tribe. The 1866 Treaty provided that each Delaware removing to the Indian country

citizens of the Cherokee Nation, but they and their descendants maintained group identity (Findings of fact No. 49 and 50, Docket No. 337).[12] The descendants of this group, who today reside in northeastern Oklahoma, comprise the defendant class Delaware Tribe of Indians, or the Cherokee Delawares.

The minor children of the adult Kansas Delawares did not immediately become United States citizens at the time of their parents' election under the 1866 Treaty. Rather, Article IX of the 1866 Treaty provided that they were to be considered temporarily severed from the tribe until they attained the age of twenty-one, at which time they too could make an election either to become citizens of the United States or remove to the Cherokee Delawares in Oklahoma. Until that time their just proportion of the Delaware tribal annuities was to be paid to their parents for the children's support and education. If thus admitted to citizenship upon reaching majority, such minors were to be

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[11] (Continued)

would receive (in addition to the life estate in 160 acres of Cherokee land) the "value" of his 80-acre allotment in the diminished reserve, plus the "value" of any improvements he had made thereon (Art. III and VI). Apparently the purchase of the Cherokee lands was to be made from the proceeds of the sale of the lands held in common (Art. IV and VI). The residue of the proceeds of the sale of the diminished reserve was to be added to the general Delaware tribal fund (Art. VI), which already contained the proceeds of the sale of the trust lands. And, as previously discussed, each Kansas Delaware was to receive his proportionate share of this fund (Art. IX).

Dockets Nos. 72 and 298 concerned only the improper disposition of the trust lands under the 1854 Treaty, and did not concern this sale of the diminished reserve provided for by the 1866 Treaty. See Findings of the fact No. 2 and 4.

[12] The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares and claim instead that the identity of the Cherokee Delawares was lost as a group when they became absorbed into the Cherokee Nation. We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time.

entitled to "all the privileges and interests herein provided for the head of the family." Art. IX, 14 Stat. at 796.

By an Act approved June 22, 1874, ch. 289, 18 Stat. 146, 175, Congress appropriated funds to pay all the minor children of the adult Kansas Delawares their proportionate share of the money and stocks held in trust by the United States for the Delaware Tribe, and directed the Secretary of the Interior to issue a fee-simple title to the lands allotted them under the 1866 Treaty. By this same Act Congress also declared all such minors to be citizens of the United States, thus eliminating the requirement of an election.[13]

Docket No. 337—25 USCA §§ 1181-86

In 1951 a suit was filed in the Indian Claims Commission by two members of the Absentee Delaware Tribe of Oklahoma on behalf of all the descendants of the Delaware Nation as constituted in 1818 to redress the wrong committed by the United States under the 1818 Treaty. The Commission found that the value of the lands in the Kansas reservation given by the United States in the 1829 supplemental treaty, together with other cash payments and gratuitous expenditures determined to be proper offsets, was insufficient consideration for the Delaware cession of its Indiana lands in 1818. The petitioners were awarded $1,627,244.64 "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." (Final Judgment, Docket No. 337).

By 25 USCA §§ 1181-86 Congress adopted a distribution plan for payment of this judgment entered in Indian Claims Commission Docket No. 337. Section 1181 of that Act provides that persons are eligible to participate in the distribution of the award if, *inter alia*, their name or the name of a lineal ancestor (1) appears on the 1906 Delaware

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[13]The pertinent provision of the 1874 statute is reproduced in Part C of the Appendix to this opinion.

per capita payroll (which covers the Cherokee Delawares); (2) is on or eligible to be on the 1940 constructed base census roll of the Absentee Delaware Tribe; or (3) appears on any available census roll or records acceptable to the Secretary, provided that such claimant shows that he is a lineal descendant of Delawares who were members of the Delaware Nation as constituted at the time of the 1818 Treaty (hereafter the "catchall" clause).[14]

The statute's effect was to permit the Cherokee Delawares, the Absentee Delawares, and the Kansas Delawares to share in the distribution of the Docket No. 337 award. Some of the judgment funds were actually distributed to members of those classes prior to the issuance of our preliminary injunction.[15] Some 1500 Munsee Indians applied

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[14] 25 USCA § 1181 provides in pertinent part:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States.

[15] See Plaintiff Weeks Complaint, para. 15; Defendants Cherokee Delawares' Answer, Twelfth Defense, para. 15; Defendants Secretary and Absentee Delawares' Answer para. 15; Transcript of Preliminary Injunction Hearing, 111, Pl. Ex. 15.

The claims by the Cherokee Delawares were made through the 1906 per capita payroll referred to in § 1181(b). This payroll was compiled for the purpose of distributing $150,000 appropriated by Congress as settlement for twelve lawsuits filed by the Cherokee Delawares against the United States. Act of April 21, 1904, 33 Stat. 189, 222. One of the suits concerned the hunting "outlet" in Kansas that was ceded by the Delawares to the United States under the 1854 Treaty. See United

for payments under the award in Docket No. 337, but were denied participation by the Bureau of Indian Affairs at the area level. Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Indian Affairs, 92d Cong., 2d Sess. 95-96 (March 13, 1972) (Pl. Ex. 6).

The plaintiff Kansas Delawares do not contest the Absentees' right to share in Docket No. 337 relating to the 1818 wrong but they do challenge the inclusion of the Cherokee Delawares in the distribution of this award, as well as that relating to the 1854 wrong, on two Fifth Amendment grounds. Essentially they argue that the inclusion of the Cherokee Delawares in the distribution of the award in Docket No. 337 (1) invidiously discriminates against those persons who are entitled to share in the award (i.e., the Kansas Delawares and the Absentee Delawares), and (2) deprives such persons of their property without just compensation.

Dockets Nos. 72 and 298—25 USCA §§ 1291-97

The Absentee Delawares in Docket No. 72, and the Cherokee Delawares in Docket No. 298, brought separate identical suits in the Indian Claims Commission for a general accounting upon all Delaware treaties with the United States. In previous proceedings the Commission had decided, and the Court of Claims had agreed, that both groups

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[15] (Continued)

States v. Delaware Tribe of Indians, 427 F.2d 1218, 1229 (Ct. Cl. 1970). A number of the Kansas Delawares contended that they were entitled to share in this settlement, but were denied participation on grounds similar to some of those argued in the present case, including *inter alia*, the fact that the 1904 Act (appropriating the funds) directed that payment was to be made only to the "Delaware Tribe of Indians residing in the Cherokee Nation" (33 Stat. 189, 222). See Defendants Secretary and Cherokee Delawares' Ex. 18, Ltr. of 1/25/1905, p. 2; Ltr. of 3/22/1905, p. 2. As a result, the 1906 per capita payroll (also referred to in 25 USCA § 1292(c)(1)) limited the distribution of the settlement to only those Delawares who were descendants of the

were entitled jointly to represent the entire Delaware Tribe.[16] Hence, the two cases before the Commission were consolidated.

Although originally filed as a general accounting, the issue in the case was subsequently narrowed to an accounting for that part of the 1854 Treaty concerning what was known as the Delaware trust lands. It was conceded by the Government, and the Commission found, that in 1856 and 1857 the United States did not carry out the treaty provision calling for the sale of the trust lands at public auction. The principal issue tried was how much additional monies the trust lands would have brought if the treaty had not been breached, and the lands had been properly sold at auction. The Commission determined that amount to be $1,385,617.81. It further found that the plaintiffs were entitled to recover damages of five (5) percent per annum simple interest on the principal sum from April 30, 1857

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[15] (Continued)

original 985 registered Delawares enrolled on the 1867 Register (i.e., the Cherokee Delawares). *Id.*, Ltr. of 8/14/1905, p. 1; Ltr. of 1/12/1906, p. 2.

The Absentee Delawares made their claims under § 1181(c). A 1956 Resolution of the Absentee Delaware Tribe provides that the January 1, 1940 census roll shall be used as the base for determining tribal membership. The "constructed base census roll" was formed by taking the names of persons shown to be of Delaware blood and adding thereto the names of persons, such as brothers or sisters, who were eligible to be on the 1940 census roll but were not listed (Defendants Secretary and Cherokee Delawares' Ex. 4, p. 12).

The Kansas Delawares could not, of course, base their claims under the 1906 per capital payroll. Their ancestors did not remove to the Cherokee lands and did not sign the 1867 Register of Cherokee Delawares. Nor could the Kansas Delawares claim under the Absentees' 1940 census roll. Their claims in Docket No. 337 were and are based upon the "catchall" clause in § 1181(d), since, by historical fact, they are lineal descendants of the Delaware Nation as constituted in 1818.

[16] See Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct. Cl. 1955).

to the date of payment. As of August 31, 1969, the principal sum plus interest totaled $9,168,171.13.[17]

By 25 USCA §§ 1291-97 Congress adopted a plan for distribution of the award entered by the Indian Claims Commission in Dockets Nos. 72 and 298. Section 1292 of the Act provides only two methods by which persons may show they are eligible to share in the distribution: (1) by the 1906 per capita payroll embracing the Cherokee Delawares; and (2) by the 1940 census roll of the Absentee Delawares.[18] These two rolls, identical to those in 25 USCA § 1181(b) and (c), allow only the Cherokee and Absentee Delawares to participate in the distribution of the award in Dockets Nos. 72 and 298. Section 1292 contains no "catchall" provision similar to 25 USCA § 1181(d) that would enable the Kansas Delawares to share in the fund by showing their

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[17]On September 10, 1969, the Indian Claims Commission ordered that

> the plaintiffs shall have and recover of and from the defendant as a final judgment the sum of $9,168,171.13 plus an additional amount of damages measured by simple interest at the rate of 5% per annum on the principal sum of $1,385,617.81 from August 31, 1969 to the date of payment of the principal sum. (Final Award, Dockets Nos. 72 and 298).

[18]25 USCA § 1292 provides:

> The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
>
> (a) they were born on or prior to and were living on October 3, 1972; and
>
> (b) they are citizens of the United States; and
>
> (c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

lineage from Delaware ancestors who were members of the tribe at the time of the wrong under the 1854 Treaty.[19]

The Kansas Delawares, reported to us as numbering over 600, note 3, supra, challenge their exclusion from § 1292 as an invidious classification in violation of the Due Process Clause of the Fifth Amendment and equal protection principles applied under the Amendment. It is this constitutional claim which we are persuaded to uphold.

The plaintiff Kansas Delawares also challenge their exclusion from distribution under § 1292 on another Fifth Amendment ground—that the exclusion amounts to a taking of their vested rights without just compensation.

Finally, they challenge the inclusion of the Absentee Delawares and the Cherokee Delawares in the distribution of the award, it again being argued that such inclusion discriminates against the Kansas Delawares and deprives them of property without just compensation.[20]

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[19]Despite the restrictive terms of the statute, plaintiff Weeks applied for participation in the award in Dockets Nos. 72 and 298 (Pl. Ex. 136a). Her application was rejected by the Bureau of Indian Affairs, and her appeal therefrom was denied by the Department of the Interior (Pl. Ex. 4).

[20]Section 1294 of the Act divides the Dockets Nos. 72 and 298 funds between the Absentee and Cherokee Delawares on a per capita basis. Ninety (90) percent of the funds apportioned to each of the two groups is to be paid out to individuals on a per capita basis. The other 10% remains to the credit of the governing bodies of each of the respective tribes to be expended for uses approved by the Secretary.

In addition to their other objections to all of the plaintiff Kansas Delawares' claims, the Absentee Delawares have moved for partial final judgment under Rule 54 F.R.Civ.P. as to the 10% of the portion of the award to remain to the credit of the Absentee Delaware Tribe of Western Oklahoma pursuant to § 1294(a). Their position is that the plaintiff Kansas Delawares have waived any claim as to said 10% of the portion of the award remaining to the credit of the Absentee Delaware Tribe, pointing to a letter introduced by plaintiffs, from the Assistant Solicitor for Indian Affairs, Department of the Interior, to

For reasons discussed in Part IV we do not agree with these latter objections of the Kansas Delawares to the inclusion of the Cherokee Delawares and the Absentee Delawares in the distribution of the awards.

We turn from this factual background to the legal issues that are raised.

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[20] (Continued)

plaintiffs' counsel (Pl. Ex. 137). The letter states that approval of attorneys fee contracts is not required on

> the specific understanding that you do not seek for your clients any part of the judgment funds in Dockets 72 and 298 which are reserved for tribal use by . . . 25 U.S.C. § 1291 *et seq*, but rather seek only their participation in the per capita distributions authorized by [25 USCA §§ 1181-86 and 1291-97]. . . .

They also argue that plaintiffs' various instruments filed in this case have not asserted a claim against the 10% portion set aside for the Absentee tribal body.

We are denying the motion for partial final judgment. Regardless of whether such waiver occurred, based on the pleadings of plaintiffs it is clear the Kansas Delawares have challenged the constitutionality of the statute and have asked that we enjoin distribution under it. See Plaintiffs' Brief on Motion for Partial Final Judgment for Absentee Delaware Tribe of Western Oklahoma, at 5 (filed 7/9/75); Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 70, 71 and 73. For reasons stated in Part V of this opinion, we must hold that 25 USCA §§ 1291-97 is not severable, and that the unconstitutional exclusion thereby of the Kansas Delawares renders the statute invalid as a whole.

With respect to the Cherokee Delawares, the position of the plaintiffs is not clear as to the 10% provision in § 1294(b). See Brief of Plaintiff in Support of Motion for Summary Judgment, at 11-12 (filed 4/16/74). Nevertheless, as stated, the plaintiffs do attack the constitutionality of the distribution statute, at least because of their exclusion, and ask that distribution under the Act be enjoined.

In § 1294(b) there is a proviso that the Secretary shall not approve the use of the funds given to the Cherokee Delaware Tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interest of its members. We have been informed by a recent certificate that the Secretary has made such finding with respect to the Delaware Tribal Business Committee. We are asked by the Cherokee Delawares to approve the finding, but that function is not within our issues or appropriate in our disposition and we are denying the motion for this relief.

II
JURISDICTION AND JUSTICIABILITY

By numerous motions the defendants have asserted that this court is without jurisdiction of the subject matter and that only nonjusticiable issues are presented. Essentially they argue that the case does not present a substantial federal question because it involves only an intra-tribal dispute not subject to judicial review. They urge two distinct theories of sovereign immunity. They argue nonjusticiability, claiming that plaintiffs raise only political questions concerning the plenary power of Congress to define Indian tribal membership, and that plaintiffs challenge nonreviewable appropriation statutes. We are not persuaded that the theories bar decision of the merits of the constitutional claims of the plaintiff Kansas Delawares.

Subject Matter Jurisdiction and The Intra-Tribal Dispute Cases

First, defendants assert that there is no substantial federal question presented, arguing that this controversy involves only intra-tribal matters not within the jurisdiction of the court, citing Groundhog v. Keeler, 442 F.2d 674 (10th Cir.); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee 321 F.2d 767 (10th Cir.) and Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), among other cases.

The complaints allege, *inter alia*, that the statutory exclusion of the Kansas Delawares was an unconstitutional and arbitrary deprivation of valuable property rights and a denial of equal protection, depriving plaintiffs of due process in violation of the Fifth Amendment (Plaintiff Weeks' Complaint, paras. 21 and 23; Plaintiffs Frazier and Rattler's Complaint, paras. 13 and 25). These averments and the complaints as a whole present causes of action arising under the Federal Constitution and within the juris-

dictional grant in 28 USCA § 1331. See Baker v. Carr, 369 U.S. 186, 198-99. Defendants challenge jurisdiction, however, contending that the cases cited demonstrate lack of a substantial federal question because only an intra-tribal dispute is involved.

Defendants rely heavily on Groundhog v. Keeler, 442 F.2d 674 (10th Cir.). The court there dismissed a challenge to a chief's appointment under a federal statute authorizing the President to appoint the Principal Chief of the Cherokee Tribe. The court reviewed authorities recognizing "that Congress has exclusive and plenary power to enact legislation with respect to the Indian Tribes." *Id.* at 678. It was concluded that a jurisdictional dismissal was appropriate since the claim was "so lacking in substance and so contrary to well established law" that it afforded no substantial basis for federal jurisdiction, citing California Water Service Co. v. City of Redding, 304 U.S. 252, 255, and Ex Parte Poresky, 290 U.S. 30, 32. See 442 F.2d at 678, n. 7.

We recognize the validity of the conclusion upholding congressional power to authorize the appointment of the chief. However, our cases are not disposed of by such reasoning. We do not find any authority unmistakably sustaining congressional authority to exclude one group of Indian descendants from benefits conferred broadly on others who apparently stand on equal footing. No previous decisions make it clear that the constitutional claims before us are obviously without merit. Levering & G. Co. v. Morrin, 289 U.S. 103, 105.

For similar reasons we find the remaining authorities and arguments unpersuasive as a challenge to jurisdiction. *Martinez, supra,* and *Puckkee, supra,* involved controversies between individual Indians and tribal entities over the official actions of the tribe. The cases are readily distinguishable since the challenges posed there were to a tribal decision or policy, and not to federal statutes. *Martinez* concerned an individual attack on a tribal decision excluding

the plaintiff from tribal membership; *Puckkee* challenged the distribution of an Indian Claims Commission award where the distribution scheme fixed by the tribal council excluded the plaintiffs; and the *Prairie Band* case sought to bar approval of a tribal distribution plan. As the cases involved essentially inter-tribal disputes over decisions by tribal authorities, the courts found no substantial federal question arising under 28 USCA § 1331. See *Martinez*, 249 F.2d at 919; *Puckkee*, 321 F.2d at 770; *Prairie Band*, 335 F.2d at 367. In contrast, this action involves a substantial challenge to congressional rather than tribal action.[21]

We are persuaded that the Kansas Delawares present substantial constitutional claims under the Due Process Clause—claims deserving consideration on their merits. And since we are also convinced that the claims are justiciable, as explained below, we feel the case is properly here under 28 USCA § 1331. See Baker v. Carr, 369 U.S. at 198; see also, Powell v. McCormack, 395 U.S. 486, 512-13.[22]

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[21] Although the controversy here might be denominated one as to "tribal membership" in the broad sense of the term, that alone does not render it an "intra-tribal' dispute. The *Martinez* opinion itself recognized that the question of tribal membership for disposition of funds could, as a result of federal legislation, become a matter of federal rather than tribal supervision. See 249 F.2d at 918, 920.

[22] In their answers defendants deny the jurisdictional amount allegations. However, the objection has not been pressed by argument or brief and we find it without merit.

As discussed above, this case properly proceeds as a Rule 23(b)(1)(B) class action. The decisions in Snyder v. Harris, 394 U.S. 332 and Zahn v. International Paper Co. 414 U.S. 291 impose prohibitions against aggregation of claims in class actions. Those decisions, however, concern Rule 23(b)(3) class actions and present no obstacle to the aggregation of claims when a common and undivided interest is present. Gallegher v. Continental Insurance Co., 502 F.2d 827, 831 (10th Cir.); see also Berman v. Narragansett Racing Association, 414 F.2d 311, 314-15 [1st Cir.), cert. denied, 396 U.S. 1037. Should the plaintiff class of Kansas Delawares prevail in this litigation, their right to share in the benefit of the award will have been determined. Still, a formula will have to be determined by statute and no individual recoveries can be, or are now, sought. See *Berman, supra* at 315-16.

Sovereign Immunity

The defendants' motion to dismiss the suit as against the United States has been granted since there is no consent to such a suit. [Order, Nov. 1, 1974]. The situation differs, however, with respect to the case against the Secretary. The doctrine of sovereign immunity does not insulate federal officers from suit when the case seeks to enjoin threatened action by a federal officer under an unconstitutional statute. See Larson v. Domestic and Foreign Corp., 337 U.S. 682, 690. We therefore rejected the governmental sovereign immunity defense as to the Secretary.

In our Weeks case it is objected that the tribal business committees which are sued are immune from suit. It is true that the Indian Nations are exempt from suit without congressional authorization. United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512; Turner v. United States, 248 U.S. 354, 358. Nor may a tribe be sued indirectly by suing tribal officers or the United States as trustee or guardian of the tribe. Barnes v. United States, 205 F.Supp. 97, 100 (D. Mont.).

However, the Weeks complaint alleges as to the Cherokee Delaware and Absentee Delaware committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective subclasses, the Cherokee Delawares and the Absentee Delawares. The Indian defendants are not immune from suit in their individual capacities. See Chemah v. Fodder, 259 F.Supp. 910, 914 (W.D. Okla.). We feel we may entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them as representatives for class action purposes under Rule 23(b)(1)(B) and 23(b)(2) and enter a proper declaratory judgment of the right of the individuals constituting the classes. We grant no relief against the tribes or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them.

[APPENDIX]

The Argument of Non-Justiciability and the Plenary Power of Congress Over the Status of Indian Tribes

Defendants argue that only non-justiciable issues are presented due to implication of the plenary power of Congress to define Indian tribal membership.

Without doubt, plenary authority has been exercised by Congress from the beginning over tribal relations of the Indians and the power has been deemed a political one, not subject to control by the judicial department. Lone Wolf v. Hitchcock, 187 U.S. 553, 565; see also National Indian Youth Council v. Bruce, 485 F.2d 97, 99 (10th Cir.). However, we are cautioned that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." Baker v. Carr, 369 U.S. 186, 210-11. As in other contexts, there is no blanket rule as to justiciability where legislation affecting the status of Indians is challenged *Id.* at 215-16. Analysis must be made of the threads of the political question doctrine to determine whether they catch this controversy. *Id.* at 211. Generally, we must first consider whether the constitutional claim presented and relief sought are of the type permitting judicial resolution, and second, whether there may be a "political question" that is not justiciable because of the separation of powers. Powell v. McCormack, 395 U.S. 486, 516-17.

In considering the first question, we note that the constitutional claims essentially are that the distribution statutes violate the Fifth Amendment's protections against unlawful taking and against denial of due process, implicating equal protection principles. See Weinberger v. Wiesenfeld, ___ U.S. ___, 43 U.S.L.W. 4393, 4394, n. 2. Such a claim of discriminatory classification is of a type regularly considered and decided by the courts. As the Court observed in rejecting the non-justiciability argument in Baker v. Carr, 369 U.S. at 226:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Moreover, the relief sought is not unfamiliar. An injunction against threatened unconstitutional action by a governmental officer is within the proper equitable remedies of the court, see Lane v. Pueblo of Santa Rose, 249 U.S. 110, 113-14, and the separate remedy of a declaratory judgment is also familiar. Powell v. McCormack, 395 U.S. 486, 517-18. We are convinced that the first general test of justiciability is satisfied.

Our second inquiry—whether there is a non-justiciable "political question" because of constitutional separation of powers—involves more detailed considerations. We must consider whether there is a bar to judicial disposition because of a constitutional commitment of the issue to a coordinate political department, lack of judicially discoverable and manageable standards for resolving the question, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, *inter alia*. See Baker v. Carr, 369 U.S. 186, 217; see also Powell v. McCormack, 395 U.S. 486, 518-19.

Of course, there is explicit constitutional authorization for congressional action in dealing with Indian affairs in the provision for Congress "To regulate commerce . . . with the Indian Tribes." And the functions relating to treaties conferred on the President and the Senate by Art. II, § 2, Cl. 2, have often been the source of power to deal with the Indian tribes. See Morton v. Mancari, 417 U.S. 535, 551-52; McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, n. 7; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66.

The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function. Instead these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294.[23] Baker v. Carr, 369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress.

We have touched earlier on the availability of familiar standards for deciding the constitutional claims presented here. We are persuaded that the claims invoke familiar due process and equal protection principles. In several instances the courts have reached the merits of due process claims of a similar sort. *E.g.*, United States v. Jim, 409 U.S. 80; Ute Indian Tribe v. Probst, 428 F.2d 491, 498 (10th Cir.), cert. denied, 400 U.S. 926; Simmons v. Seelatsee, 244 F.Supp. 808, 815 (E.D. Wash. 1965 (three judge court), aff'd mem., 384 U.S. 209; see also McCurdy v. Steele, 353 F.Supp. 629, 637-38 (D. Utah 1973), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

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[23]We refer to the provision in § 1294(a) and (b) that 10% of the award be withheld for subsequent advancement, expenditure, etc., for any purpose authorized by the tribal governing bodies of the Cherokee and Absentee Delawares and approval by the Secretary of the Interior. 25 USCA §§ 1294(a), (b). This portion of the statute is affected by our decision only because of our conclusion that the distribution statute, which has no separability clause, must be held invalid as a whole. See Parts III and V, *infra*.

Nor do any of the remaining considerations underlying the political question doctrine apply. Decision on the precise constitutional issues does not involve any disrespect for a political decision by a coordinate branch. And, of course, there is no danger of embarrassment by multifarious pronouncements by two branches as in foreign affairs. See Baker v. Carr, 369 U.S. at 211-13, 217.

For these reasons we are satisfied that, on analysis, the political question doctrine does not bar consideration of the constitutional claims of the Kansas Delawares. They may invoke jurisdiction of the court under USCA § 1331 to decide the validity of the statutory exclusion and inclusions in light of established constitutional limitations. "[T]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942).

The Objection to Justiciability on the Theory of Nonreviewability of Appropriate Statutes

The Absentee Delawares advance a final argument that nonjusticiable questions are involved because appropriation statutes are challenged, relying on United States v. Price, 116 U.S. 43 and United States v. Jordan, 113 U.S. 418. The plaintiff Kansas Delawares reply that appropriation statutes are not involved. They say that the determination to pay the awards was made in earlier, separate appropriation acts, Pub.L. No. 88-635, ch. IX, Oct. 7, 1964, 78 Stat. 1033-34; Pub.L. No. 91-167, ch. IX, Dec. 26, 1969, 83 Stat. 453, and that the challenged distribution statutes are not appropriation acts. Without deciding this point we consider the argument on the basis that the distribution statutes under attack are a part of the appropriation procedure.

We conclude that the reasoning of the *Price* and *Jordan* cases does not apply. The cases involved determinations that restitution should be made for property taken for wartime purposes and by unlawful taxation, respectively. In both cases the government challenged a prior congressional determination by statute of the government's obligation. In *Jordan* the Court stated that the clear import of the statute was that the amount specified had been collected contrary to the tax regulations involved, and that this congressional determination, made on recommendation of the Secretary of the Treasury, could not be challenged in the subsequent suit. 113 U.S. at 423. Similar reasoning was relied on in the *Price* case.

We have also noted Buchanan v. Patterson, 190 U.S. 353; United States v. Louisville, 169 U.S. 249, and Kruszewski v. United States, 163 F.2d 884 (7th Cir.), cert. denied, 333 U.S. 880, which recognize the principles of *Price* and *Jordan*. In none of the cases, however, is there support for the inference that a statute, because it involves an appropriation function, is unreviewable if a substantial constitutional claim is made that an invidious or irrational classification or exclusion is made by the statute. And, of course, the fact that the spending power is involved does not bar consideration of constitutional issues. See Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 62-78 (1936); Veazie Bank v. Fenno, 8 Wall. 533, 541 (1869); cf. Flast v. Cohen, 392 U.S. 83, 127 (Harlan, J., dissenting). We feel that involvement of the appropriation function is no bar to hearing the merits of the constitutional claims of those excluded by a classification asserted to be invidious and irrational.

Thus, we are convinced that substantial constitutional claims are asserted and that they deserve disposition on their merits. The claims are proper for consideration under familiar judicial standards and none of the facets of the political question doctrine bars judicial review.

III

CONSTITUTIONALITY OF THE EXCLUSON OF THE KANSAS DELAWARES BY 25 USCA §§ 1292 and 1294

The plaintiff Kansas Delawares claim that the exclusion barring their participation in the award in Dockets Nos. 72 and 298, redressing the 1854 wrong, is irrational and invidious under the Due Process Clause, and the equal protection principles incorporated therein; and also that the statute takes their vested individual rights without just compensation. We find merit in plaintiffs' first claim, not agreeing however with their unlawful taking theory.[24]

In assessing the claim of the Kansas Delawares that the exclusion amounts to an irrational and invidious classification, we follow equal protection principles applied under the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2, Johnson v. Robinson, 415 U.S. 361, 364-65 & n. 4. Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate governmental interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, ... U.S. ....., ... (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Election, 394 U.S. 802, 809.

We approach the question mindful of the presumption of constitutionality that the statute carries. Flemming v. Nestor, 363 U.S. 603, 617. As noted, the award in Dockets Nos. 72 and 298 seeks to redress a wrong to the Delaware

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[24]It is convenient to address plaintiffs' just compensation claim in Part V of this opinion dealing with equitable jurisdiction and remedies.

tribe from the improper sales of tribal lands in 1856 and 1857. Since the excluded Kansas Delawares trace their descendancy from the injured tribe as of that time, a substantial question as to the rationality of the exclusion is raised. We turn, therefore, to the various justifications for the classifications that have been suggested or may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

The defendants argue that there are several justifications that serve as rational bases for the classifications drawn in 25 USCA §§ 1292 and 1294. When the matter was before the Congress the arguments of the Cherokee and Absentee Delawares for the restrictive classifications centered heavily on their objections to claims of the Munsee groups and the delaying effect those claims had caused in distribution of the award in Docket No. 337 relating to the 1818 wrong. Due to the importance of the legislative history and its focus on the Munsee groups, we will first consider the legislative source materials.[25]

The Legislative History and the Munsee Groups

As noted, the Kansas Delawares did share in the award in Docket No. 337, redressing the breach of the 1818 Treaty, by virtue of a catchall provision in the distribution statute including all persons who "are lineal descendants of Dela-

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[25]It is proper to examine the legislative history of a statute to see if it discloses a rational basis for the classifications made by the statute, see, *e.g.*, Richardson v. Belcher, 404 U.S. 78, 82; United States v. Maryland Savings-Share Inc. Corp., 400 U.S. 4, 6, as well as other grounds of justification that may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

This court on its own motion, and with notice to the parties, requested and obtained a legislative history covering the two distribution statutes (25 USCA §§ 1181-86 and 1291-97) involved in this case through the assistance of the Administrative Office of the United States Courts and the congressional staffs. These materials were filed with the clerk of the court for examination and comments by the parties.

ware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 . . ." 25 USCA § 1181(d). Likewise the legislation originally introduced for the purpose of distributing the funds appropriated to pay the award in Dockets Nos. 72 and 298, redressing the breach of the 1854 Treaty, would have included the Kansas Delawares since it proposed to bring current and amend the distribution rolls developed pursuant to 25 USCA § 1181 so as to include all persons who were lineal descendants of members of the Delaware Tribe as it existed in 1854. H.R. 5200, 92d Cong., 1st Sess. §2 (March 1, 1971); S. 1067, 92d Cong., 1st Sess. §2 (March 2, 1971).[26]

However, the bill which was ultimately passed by Congress, H.R. 14267, 92d Cong., 2d Sess. (1972) (as amended), narrowed the distribution provision. The distribution scheme finally enacted followed the scheme for Docket No. 337, 25 USCA § 1181, except for the crucial difference that the third or catchall provision in § 1181(d) which had allowed the Kansas Delawares to share was omitted from § 1292. Only persons who could trace their ancestry to a described 1906 payroll (*i.e.*, the Cherokee Delawares), or whose name or whose ancestor's name was on, or was eligible to be on, the constructed base census roll as of 1940 of the Absentee Delawares, were included under this distribution provision.

We have examined the legislative history relating to this change in the distribution provisions. The change was made after the Cherokee Delawares and Absentee Delawares objected to the distribution provisions in the bills originally introduced. The substitute distribution provision

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[26]The use of the updated roll in H.R. 5200 was recommended by the Department of Interior. See House Committee Report accompanying H.R. 14267, H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6).

which was adopted was essentially that proposed by the two tribal groups.[27]

The Cherokee and Absentee Delawares advanced several reasons to Congress for rejecting the distribution provision in the bills originally introduced and adopting instead their narrower proposal referring to the 1906 roll and the constructed roll as of 1940.[28] The underlying problem, which was cited repeatedly, concerned the Munsee groups. The Munsees were conceded to share common origins with early Delawares in New Jersey, Pennsylvania and Maryland, to whom they were considered related and with whom they formed one cultural group. At least some officials in the Bureau of Indian Affairs had taken the position that certain Munsee Indians should qualify to share in the award in Docket No. 337 under the catchall provision in 25 USCA § 1181 covering all lineal descendants of the 1818 Delaware Nation. The Bureau had indicated that these Munsees might apply for participation in the distribution under this provision and extended various administrative deadlines in

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[27]See Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 31 ff.; (March 13, 1972) (Pl. Ex. 6) [hereinafter cited as House Subcomm. Hearings]; Hearings on H.R. 5200, H.R. 14267 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972) (Pl. Ex. 7).

[28]See *e.g.*, Letter from Bruce M. Townsend, Chairman of the Delaware Tribal Business Committee (Cherokee Delawares), to Congressman Wayne H. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, Nov. 16, 1971, attached to House Subcomm. Hearings, *supra* n. 27, at 9 ff.; Statement of Louis L. Rochmes, Attorney for the Delaware Tribes, March 13, 1972, attached to House Subcomm. Hearings, *supra* n. 27, at 45 ff.; House Subcomm. Hearings, *supra* n. 27, at 10, 14-18, 21-22, 25, 46-49, 71-74 (testimony of Bruce M. Townsend and Louis L. Rochmes); Hearings on H.R. 14267, H.R. 5200 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4-5 (May 10, 1972) (Pl. Ex. 8); Hearings on S. 3113, S. 1067 S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 42-49, 60-61, 69-71 (July 21, 1972) (Pl. Ex. 5) (testimony of Bruce M. Townsend, Harold Pruner and Lawrence Snake).

order to allow the Munsees to make such applications. It appears that some 1500 Munsees ultimately applied to participate in the award in Docket No. 337, that all 1500 applications had been rejected by the Bureau at the area level, and that some 739 were still pending on appeal at the Bureau in Washington at the time of the hearings on legislation to distribute the awards in Dockets Nos. 72 and 298. See House Subcomm. Hearings, *supra* n. 27, at 95-96.

The Cherokee and Absentee Delawares objected that the Munsee Indians, including the Christian Munsees, were not, in fact, descendants of the Delaware Nation as it was constituted in 1818 or in 1854, and that the Bureau's actions in their behalf were unfounded. See House Subcommittee Hearings, *supra* n. 27, at 56-57, 72. Moreover, they objected that there was Bureau solicitation of the Munsees to apply and that subsequent extensions of deadlines for the Munsees' benefit, coupled with the volume of appeals produced when the Munsee applications were rejected, had unreasonably delayed the complete distribution of the funds in Docket No. 337. They argued that the use of similar "lineal descendants" provision in the new distribution act for the award in Dockets Nos. 72 and 298 would lead to a repetition of the Munsee problem and that a precise definition of the identity of those entitled to share in the latter award was therefore necessary. See the Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*. Other reasons for the restriction of the award to the Cherokee and Absentee Delawares were also urged and they are considered below in discussing the various bases said to justify the exclusion of the Kansas Delawares.

The Munsee situation was undoubtedly a major factor in Congress' decision to drop the catchall "lineal descendants" provision in § 1292. However, the legislative history indicates that Congress was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of

excluding a group of people, such as the Kansas Delawares who were unquestionably lineal descendants of the Delaware Nation of 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe.[29]

As stated, the Congress adopted basically the position of the Absentee and Cherokee Delawares that the award in Dockets Nos. 72 and 298 be divided between their two groups. The committee reports accompanying the pending proposal H.R. 14267 stated that "[t]he Delaware Indians are divided into two groups: the Delaware Tribe, and the Absentee Delaware Tribe of Western Oklahoma." H.R. Rep. No. 1081, 92d Cong., 2d Sess. 1 (May 22, 1972); S. Rep. No. 92-1126, 92d Cong., 2d Sess. 1 (Sept. 14, 1972) (Defendants Secretary and Cherokee Delawares' Ex. 6 and 7 respectively). The House Report states that the recommendations of the Department of Interior (which had proposed up-dating the Docket No. 337 roll to include persons who are lineal descendants of the Delaware Tribe as it existed in 1854) were strenuously opposed by both groups (the

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[29]See the statement by Mr. Rochmes, tribal attorney for the Absentee and Cherokee Delawares in response to questions by the committee (House Subcomm. Hearing, *supra* n. 27, at 78-80), Appendix to this opinion, Part A.

There is evidence in our record that at least some of the Cherokee and Absentee Delawares, themselves, were unaware of the existence of the Kansas Delawares at the time they testified before Congress. Mr. Townsend, the Chairman of the Delaware Tribal Business Committee (Cherokee Delaware) and one of the principal witnesses before Congress urging the adoption of a distribution scheme utilizing only the 1906 and 1940 rolls, testified in the course of this litigation that he was unaware of the existence of the Kansas Delawares, as such, until after the passage of 25 USCA §§ 1291-97, when it was discovered that the Kansas Delawares were precluded from sharing in the award under the statute. Transcript of Preliminary Injunction Hearing, 76, 91, Pl. Ex. 15. Mr. Townsend further testified that he did not think the question of the Kansas Delawares' sharing in the award in Dockets Nos. 72 and 298 was ever brought before or considered by Congress in the course of the legislative hearings on distribution legislation for the award. *Id.* at 82-85.

Absentee and Cherokee Delawares), and that "the Indian position is, in the opinion of the committee, a defensible one." *Id.* at 2. Neither the reports nor the floor proceedings of both Houses disclose further reasons or discussion for the classifications in the statute as enacted. See 118 Cong. Rec. S 15063 (daily ed. Sept. 18, 1972); 118 Cong. Rec. H 8700 (daily ed. Sept. 25, 1972).

From our examination of the legislative history we find that the Congress was specifically requested by the Absentee Delawares and the Cherokee Delawares to delete the catchall provision, and that Congress made the decision in response to the urging of those groups. On the record before us, we find that neither Congress nor its committees were made aware that the limitation of distribution to the two rolls would exclude a group which had lived on the Kansas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do.[30] Instead the focus was on the Munsee Indian groups, including the Christian Indians,[31] and paramount consideration was given to the Munsee situation in considering the proposed change in the distribution statute.

While we have no question of statutory interpretation before us making germane the legislative history and intent in the usual context, we nevertheless feel these legislative materials are relevant in connection with defendants' claim that the Congress was aware that the classification would exclude some Indians who could ethnologically claim to be Delawares.[32] It is disturbing that the Congress was apparently not aware of the Kansas Delaware group and we are persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution.

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[30]See Appendix to this opinion, Part B.

[31]See Article 13 of the 1854 Treaty, 10 Stat. 1048.

[32]See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

Suggested rational bases for the exclusion of the Kansas Delawares in 25 USCA §§ 1292 and 1294

We turn to the several justifications advanced by defendants as supporting the rationality of the exclusion of the Kansas Delawares from participation in the award redressing the 1854 wrong.

First, defendants rely on the references in 25 USCA § 1292 to the 1906 Cherokee Delaware roll and the 1940 Absentee Delaware roll. They say that reference to these objective standards in preference to an ethnological standard of lineal descendancy was intentionally chosen to eliminate the possibility of wrongful payment due to deliberate misrepresentations or misunderstanding, to avoid delay, and to eliminate the confusion that had arisen in distribution of the Docket No. 337 award. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, 64. We cannot agree, concluding that the argument will not withstand analysis of the statutes and factual circumstances, or the constitutional protections against discriminatory classifications made clear by the Supreme Court.

We have noted earlier that complaints made to Congress in connection with delay and controversy, among other things, were directed at the Munsees,[33] and not at the Kansas Delawares. The testimony indicated that approximately 300 Kansas Delawares shared in the earlier Docket No. 337 award redressing the 1818 wrong (Transcript of Preliminary Injunction Hearing, 103-04, Pl. Ex. 15), and the legislative history before us reflects no complaints of delay or controversy in connection with the participation by these Kansas Delawares in the distribution of that award.

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[33]See Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*.

Moreover, in response to requests for deadlines to avoid delay, the enactment providing for distribution of the Dockets Nos. 72 and 298 award included limitations of four months for applications for enrollment, 60 days for rejection by the Secretary, 30 days for appeal, and 60 days for determination of an appeal, 25 USCA § 1293. This protection against delay and controversy moots the substance of defendants' arguments. In these circumstances the suggested considerations of administrative convenience cannot support the exclusion of the Kansas Delawares. The arguments must fall in view of the admonition in Stanley v. Illinois, 405 U.S. 645, 656:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

We are also unconvinced by the suggested rationale of avoidance of spurious claims. It is true that §1292 refers to two existing 1906 and 1940 rolls. However, the suggested potential of spurious claims is not eliminated since the standards of entitlement were not confined within the compass of objective records. The Secretary was required by §1292 to prepare a distribution roll of Absentees living on October 3, 1972, who were United States citizens, and who could show that:

> (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware tribe of Western Oklahoma, approved by the Secretary. (25 USCA § 1292(c)(2))

It is clear that under the §1292 criteria an Absentee Delaware could apply for enrollment under §1293[34] and partake in the distribution of the award if he could show that his name or that of his "lineal ancestor" was on or was "eligible to be on" the constructed base census roll as of 1940. Thus it was open to an Absentee to show entitlement by ethnological proof of Delaware blood lines even though neither his name nor that of his ancestor actually appeared on the described roll.[35] This proof is not limited to objective records. Moreover, we note that both Cherokee and Absentee Delawares could show entitlement for §1292 purposes if the name of their "lineal ancestor" was on the described rolls—a showing that again would involve tracing Delaware lineage subsequent to and outside the described rolls.

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[34]Applications are required to be made by § 1293 to an Area Director. The applications are considered by the Secretary under the § 1292 criteria to determine eligibility for listing on the distribution roll of persons entitled to share in the distribution of the award.

[35]The method of preparation of the Absentee "constructed base census roll as of 1940" included listing persons shown to be of Delaware blood who were *eligible* to be on the 1940 roll of Caddos and Absentee Delawares, but were not listed. The method of preparation of the "constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary of the Interior," 25 USCA § 1181(c), is described in the Senate Report accompanying H.R. 16402 as follows (S.Rep. No. 1518, 90th Cong., 2d Sess. 12 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 4)):

> Membership in the Absentee Delaware Tribe is governed by a resolution adopted by the tribe on December 22, 1956, and approved by the Acting Assistant Commissioner on July 30, 1957. The resolution provides that the January 1, 1940, census roll shall be used as the base for determining membership in the tribe. That roll is the census of the Wichita and Affiliated Bands of Indians (Caddo and Absentee Delaware). In constructing the base census roll referred to in section 1(c) of the proposed bill, the tribe has taken from the 1940 roll the names of persons shown to be of Delaware blood and has included the names of persons, such as brothers and sisters, who were eligible to be on the 1940 roll but were not listed. The base roll which has not yet been approved lists 331 individuals. The executive committee estimates that the membership roll as of January 1, 1967, will contain approximately 800 names.

The prevention of spurious claims is recognized as a legitimate governmental interest in connection with classifications. See Jimenez v. Weinberger, 417 U.S. 628, 636. Here, however, as in *Jimenez*, the effect of the statute is to create subclasses which are treated unequally. For example, members of the Absentee Delaware subclass can show entitlement to participate by proof of Delaware lineage, independent of any roll, through proof that an ancestor was "eligible" to be on the constructed base census roll as of 1940, although not listed. But members of the other subclass, consisting of those like the Kansas Delawares, are denied the opportunity to make a showing of entitlement through proof of Delaware lineage in any way on the suggested rationale that the statute furthers the interest of prevention of spurious claims. The rationale is untenable "since the potential for spurious claims is exactly the same as to both subclasses." Jimenez v. Weinberger, *supra*, 417 U.S. at 636.[36]

Thus, in the circumstances before us, we cannot agree that considerations of the avoidance of potential fraud, delay and controversy, or of easing administrative burdens, justify the discriminatory exclusion of the Kansas Delawares. See Jimenez v. Weinberger, *supra*, 417 U.S. at 635-37; Stanley v. Illinois, 405 U.S. 645, 658; Reed v. Reed, 404 U.S. 71, 76.

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[36]The dimensions of the problem viewed from the numbers of the three groups involved do not indicate that the Kansas Delawares would present more difficulties than the other groups. It was testified before us that the Bureau of Indian Affairs has advised that 7,765 Cherokee Delawares and 1,808 Absentee Delawares had been approved for participation in the award at the time of the preliminary injunction hearing in March, 1974 (Transcript of Preliminary Injunction Hearing, 109, Pl. Ex. 15). As earlier noted, it has been reported to us that the identities of approximately 678 Kansas Delawares were known to the plaintiff Weeks (see note 3 *supra*). Approximately 300 Kansas Delawares shared in the Docket No. 337 award, according to the testimony (Transcript of Preliminary Injunction Hearing, 103-04). And, as stated the complaints as to delay were related to the Munsee groups, not to the Kansas Delawares.

Second, it was argued before Congress and the court that a proper reason for limitation of distribution of the award to the Cherokee Delawares and Absentee Delawares is found in the final award of Indian Claims Commission in Dockets Nos. 72 and 298. The argument is that whereas the award in Docket No. 337 was made to "the petitioners on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818", the award in Dockets Nos. 72 and 298 was made to the "plaintiffs," who were the Cherokee and Absentee Delawares.

We cannot agree with the inference drawn from the form of the award. In its first finding of fact in Dockets Nos. 72 and 298 the Commission stated:

> 1. Plaintiffs, Absentee Delaware Tribe of Oklahoma et. al. in Docket No. 72, and the Delaware Tribe of Indians in Docket No. 298, are entitled under the Act of August 13, 1946, 60 Stat. 1049, *to jointly represent the entire Delaware Tribe in its claim against the United States.* (emphasis added)

In addition the opinion of the Commission refers to its earlier determination (2 Ind. Cl. Comm. 253), that "these two groups were entitled jointly to represent the entire Delaware Tribe." 21 Ind. Cl. Comm. 344, 345.

The finding of the representative capacity in which the plaintiff groups brought suit accords fully with the procedure laid out by the Indian Claims Commission Act, 60 Stat. 1049, 25 USCA §§ 70-70v. The Commission's function is defined as hearing and determining claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians" 25 USCA § 70a. This function is basically to identify the injured tribal entity, making plain the time of the wrong and the injured group. Cherokee Freedmen, v. United States, 195 Ct. Cl. 39, 52. "[T]he ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity."

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). In view of the Commission's finding and the procedural scheme we must read the reference to the "plaintiffs" in the Commission's award in Dockets Nos. 72 and 298 as being to them in a representative capacity on behalf of the entire Delaware Nation as compensation for the 1854 wrong.

Defendants offer a related argument that the law requires that awards of the Indian Claims Commission be made to existing Indian tribes and not to individual descendants of the tribe as it existed at the time of the wrong, relying on Minnesota Chippewa Tribe v. Untied States, 315 F.2d 906 (Ct. Cl.). This purported rule of law is suggested as a rational basis for the statutory exclusion. We must disagree, concluding that the Court of Claims decisions do not support the position of defendant.

Before the Congress defendants pointed to statements in Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 913-14 (1971):[37]

> Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the group. (*Id.* at 913)
>
> At least in such proceedings the Indian Claims Commission Act requires that the awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today. (*Id.* at 914)

The court's opinions since *Minnesota Chippewa* make it clear that the Commission's functions are limited to identifying the injured tribal entity, making plain the time of the wrong and the injured group. See Cherokee Freedmen v. United States, 195 Ct.Cl. 39, 52 (1971). The court has

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[37]See the Statement of Mr. Rochmes cited n. 28 *supra*.

stated that the Commission is to leave to the Congress and its agents the decision of the composition of the injured tribe and the designation of those entitled to participate in the judgment. *Id.*

In Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 944 (Ct. Cl. 1965), the court discussed the *Minnesota Chippewa* case and others and the Commission's proper function:

> The court held that, since the claim was on behalf of the entity, the award must run to the entity, not to the individual persons or descendants. This was to make it clear, first, that the claim is a group not an individual demand, and, second, that nothing in the Indian Claims Commission Act bars any current member of the represented group from benefiting or requires the inclusion of descendants who are not now such members. Those questions are left open by the Act. The determinations of 'how the award is to be paid and precisely who can participate in an award' remains for Congressional and administrative determination—the Indian Claims Commission Act standing wholly aside from that extra-judicial resolution. Peoria Tribe of Indians v. United States, supra. *The form of the award should not pre-determine the persons who will benefit from the award to the group—as it might do if there were binding references to descendants of past members or comparable individualization of the decree.* (emphasis added)

And in Cherokee Freedman v. United States, 195 Ct. Cl. 39 (1971), the court made clear the limitations on the functions of the Commission and the Court of Claims again:

> A third separate problem in this family of related topics is the composition of the particular entity or group in whose favor an award is made under the Claims Commission Act—whether specific individuals,

classes of persons, or subgroups saying that they are members or components of the prevailing group are entitled to participate in the judgment. Those questions we have consistently held, from the beginning of litigation under the Act, to be beyond the competence of the Commission and this court; they are reserved for Congress or for authorized administrative resolution when the award is paid. (*Id.* at 46)

* * *

We have always taken pains to assure that any group or persons claiming a right to participate (at least colorably) in a judgment under the Act not be totally excluded, either by the form of the award or by the restrictive nature of the entity to which the award goes in name. Since Congress (or its agent) is to settle disputes as to the composition of, or membership in, the group entitled to the money, the Commission's judgment should not bar an individual or entity from urging before the other branches a right to share on the ground of such membership. (*Id.* at 48) (emphasis added.)

* * *

The third protective device is to make clear—as we do now and as the Commission should also do in its final decision—the identity of the injured tribal entity. That is well within the authority of court and Commission under the Claims Commission Act (see McGhee, Yuchi, Red Lake and Pembina Bands, and the other decisions cited supra), and it will be that entity whose composition will be decided by Congress or its designee. (*Id.* at 52)

* * *

The award itself need not say in precise terms that it is for the benefit of the Cherokee Nation "as it existed or was constituted before 1893 (or from 1872-1893)" so long as it is plain that that is the time and

> the group involved. *The other branches of government can then decide the composition of the Cherokee tribe as of that period.* (Id. at 52) (emphasis added.)

See also Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974).

Hence, we are satisfied that the Commission's authority does not extend to designating the beneficiaries of its awards. This is further reason why we feel the Commission did not intend or make a designation of the Cherokee and Absentee Delawares as the beneficiaries of the award in Dockets Nos. 72 and 298, and that its reference to the "plaintiffs" was merely in the sense of their representative capacity of the injured tribal entity. In this case neither the award nor the decisions of the Court of Claims relied on bears on the question of designation of beneficiaries of the Commission's awards; and they may not serve here as a rational basis for the statutory classifications made by Congress.

Third, defendants argue that rationality of the exclusion lies in the fact that the Kansas Delawares gave up any right to share in future Delaware tribal assets by voluntarily electing to sever their tribal membership pursuant to Article IX of the 1866 Treaty with the Delaware Indians, 14 Stat. 793, 796.[38]

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[38]Defendants point to the last sentence of Article IX describing the effect of an election by a Delaware to become a United States citizen:

> There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

Defendants contend that a similar severence of tribal membership and membership rights was made by statute in 1874 (18 Stat. 146,

We are not persuaded that any previous waiver or surrender of rights prejudices the Kansas Delawares with respect to this award. Article IX of the 1866 Treaty expressly provided that any Delaware electing to become a citizen would receive patents and his "just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States." 14 Stat. at 796. Had the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857. The award in Dockets Nos. 72 and 298 was clearly intended to redress the injury and diminution of proceeds from those sales.

We find it a strained interpretation of the 1866 treaty to say that the Kansas Delawares waived any rights to share in such a future award as is involved here. The language of the treaty does not impel such a result and there was no showing that the Indian victims were aware of the wrong done them in the sale of the Delaware lands. "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." Choate v. Trapp, 224 U.S. 665, 675; see Antoine v. Washington, 420 U.S. 194,

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[38] (Continued)

175) as to Kansas Delawares who were minors in 1866. (Plaintiffs disagree, arguing that the statute did not have the effect of severing the minors' membership in the Delaware Tribe. However we feel we need not resolve this question in view of our disagreement with the defendants' basic position that adults' or minors' rights in connection with the award in Dockets Nos. 72 and 298 were surrendered or waived by the earlier acts of their ancestors or by the intent of the 1874 statute and the 1866 Treaty provisions.

200; Choctaw Nation v. Oklahoma, 937 U.S. 620, 631.[39] We cannot accept the waiver argument as a justification for the exclusion.

Fourth, it is argued that rationality for the distribution statute may be found in Article 8 of the 1854 Treaty with the Delawares, 10 Stat. 1048, 1050. This provision states that:

> Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Defendants argue that this reservation of legislative power by the Congress permits the statutory exclusion of the Kansas Delawares from participation in the award.

Again, construing the treaty as the Indians would have understood it, Choctaw Nation v. Oklahoma, *supra,* 397 U.S. at 631, the inference that any use made of this reserved power must be sustained, is unjustified. Article 8 cannot be said to have reserved or conferred power to prejudice Indian rights without regard to constitutional limitations. We have earlier noted that the plenary power of Congress to regulate Indian affairs is subject to constitutional limitations, see United States v. Klamath Indians, 304, U.S. 119, 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n.

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[39] What has been said also disposes of a related point concerning Article IX of the 1866 Treaty. It is argued that Article IX limited the Kansas Delawares to their just proportion of credits *"then held in trust* by the United States (emphasis added), and precludes their asserting any rights thereafter to such funds, including the award here. Again, the inference of a waiver or surrender of a right to future redress by the award is untenable. This treaty provision likewise does not impel such an interpretation, and it would violate the cited long-standing canon of construction of Indian treaties. And, as noted, there was no showing of awareness by the Indians of the wrong.

12 (D. Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.). The provisions of Article 8 likewise may not be construed to reserve a power immune from constitutional limitations.

Fifth, defendants say that the plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. Defendants contend that the provisions of the later statute—here the distribution enactment—superseded prior treaty provisions and statutes, citing, *inter alia*, Choate v. Trapp, 224 U.S. 665, 670-71; Lone Wolf v. Hitchcock, 187 U.S. 553, 566; Thomas v. Gay, 169 U.S. 264; and Ward v. Racehorse 163 U.S. 504. Defendants argue, contrary to plaintiffs' position, that in light of this unilateral power of Congress to amend or modify treaties and statutes, no "vested rights" were created in favor of the Kansas Delawares by the 1866 Treaty. Defendants conclude that any rights of the Kansas Delawares have been lawfully abrogated by the distribution statute, 25 USCA § 1292, under authority recognized in United States v. Jim, 409 U.S. 80, and Gritts v. Fisher, 224 U.S. 640.

We cannot agree with the inferences drawn. The issue is not whether such power is held by the Congress to abrogate treaties or to control distribution of tribal property. Instead, the issue is whether the exercise of power in this area by the distribution statute comports with the safeguards of the Due Process Clause. For we are convinced that the congressional power to abrogate treaties is circumscribed by the limitations in other parts of the Constitution. See United States v. Klamath Indians, supra, 304 U.S. at 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n. 12 (D.Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

Moreover, we feel that the dispute between the parties over whether any "vested rights" were conferred on the Kansas Delawares by the treaties need not be resolved to

dispose of this argument concerning the power to amend treaties. The plaintiffs constitutional claim under the Due Process Clause and equal protection principles need not be grounded on a "vested right." See Shapiro v. Thompson, 394 U.S. 618, 627, n. 6; see also Goldberg v. Kelly, 397 U.S. 254, 262 & n. 8. Regardless of whether the Government was obligated to grant relief for the historic wrong to the Delawares, the relief having been undertaken and the award and appropriation having been made, we feel that the statute drawing classifications is nevertheless subject to due process and equal protection limitations. See *id.*; Griffin v. Illinois, 351 U.S. 12, 18. For even if they have no "vested" or contractual right, the Indian claimants may not be discriminated against by invidious classifications or by classifications having no rational relation to a legitimate legislative goal. See Weinberger v. Salfi, ... U.S. ....., (slip opinion at 20).

Finally, defendants urge that reference to the 1906 and 1940 rolls of the Cherokee and Absentee Delawares, respectively, represents a rational congressional decision to distribute the award to modern day tribal entities and their members, rather than to lineal descendants of the injured tribe as constituted in 1854. Defendants also contend that reference to the described rolls represents a congressional exercise of recognized power to define tribal membership for purposes of the distribution. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 100, 104, 105, 113.[40] We are unable to

[40]In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA § 1292(c)(2). *E.g.*, a person born after July 30, 1957, must have 1/8 Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under § 1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than 1/8 Delaware blood.

accept these propositions as a rational justification for the exclusion.

We start from the point that the Indian Claims Commission Act and its underlying policies are neutral, not favoring any particular pattern of distribution of the Commission's awards. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52 (1971). Nevertheless, it must be remembered that the claim is that of the injured ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Bank of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). While in the absence of some provision to the contrary, the right of individual Indians to share in tribal property generally depends on tribal membership, see Halbert v. United States, 283 U.S. 753, 762-63; United States v. Jim, 409 U.S. 80, 82, we are convinced that distribution of awards under the Act for historic wrongs is not controlled by technical rules of ownership, descent and distribution. Distribution is for congressional disposition, consistent with constitutional limitations applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief the award affords for injury to the ancestral tribe.

In this instance the claim of the Kansas Delawares to participation in the award has the foundation of their descendancy from the tribe injured at the time of the historic wrong. The wrongful sales of the tribe's lands in 1856 and 1857 diminished the amount of the resulting fund which had been established for the benefit of the Delaware "people" by Article 7 of the 1854 treaty with the tribe, 10 Stat. 1048, 1050, as the traty repeatedly makes clear. And further, the Kansas Delawares' position is re-enforced by Article IX of the 1866 treaty with the tribe, 14 Stat. 793, 796, recognizing the Kansas Delawares' right, *inter alia*, on electing to take United States citizenship, to their "just proportion" of the tribal credits then held in trust by the United States—credits that would have included

the proper measure of payment from sales of the trust lands, but for the wrong to the tribe.

The award in question was made to redress that historic wrong to the entire Delaware Tribe under the 1854 treaty, and the Cherokee and Absentees Delawares were representing "the entire Delaware Tribe in its claim against th United States." See Findings of Fact 1, 23 and 24, Dockets Nos. 72 and 298, 21 Ind. Cl. Comm. 344; opinion in said dockets, 21 Ind. Cl. Comm. at 345, 347. The Kansas Delawares are descendants of the injured ancestral tribe and some 300 of them recently shared in the award under the Act in Docket No. 337 for the similar historic wrong of 1818.

In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefited, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two "modern groups" for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226.

We doubt that the Congress actually intended or realized that exclusion of a group such as the Kansas Delawares would result. But in any event, the resulting unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act. Jimenez v. Weinberger, 417 U.S. 628, 636-38; see Weinberger v. Salfi, ___ U.S. ___, ___ (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84.

Giving the statutory classification the presumption of constitutionality as we must, and considering all justifica-

tions for the classification, we nevertheless must hold that the resulting exclusion of the Kansas Delawares violates the fundamentals of due process and equal protection.

IV

VALIDITY OF THE CHALLENGED INCLUSIONS OF THE CHEROKEE DELAWARES AND THE ABSENTEE DELAWARES IN DISTRIBUTION OF THE AWARDS

Plaintiff Kansas Delawares further argue that the Cherokee Delawares are not entitled to participate in the awards in either Docket No. 337 or Dockets Nos. 72 and 298, and that the statutes providing for distribution of both awards, 25 USCA §§ 1181-86 and 1291-92, violate their Fifth Amendment rights insofar as they include the Cherokee Delawares in the provisions for distribution of both awards. Plaintiffs also claim that the Absentee Delawares are not entitled to share in the award in Dockets Nos. 72 and 298, relating to the 1854 wrong. They say that the distribution statute for that award, 25 USCA §§ 1291-97, violates their Fifth Amendment rights insofar as it includes the Absentee Delawares.[41]

We disagree with these positions taken by the Kansas Delawares and conclude that the challenged distribution provisions are valid insofar as they included the Cherokee and Absentee Delawares.[42]

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[41] Plaintiffs do not challenge the right of the Absentee Delawares to share in the award in Docket No. 337, redressing the breach of the 1818 Treaty. See Plaintiffs' Proposed Finding of Fact No. 31; Brief of Plaintiff in Support of Motion for Summary Judgment at 80; Plaintiffs' Reply Brief on Constitutional Issues at 2.

[42] We realize that as a result of our conclusion in Part III that the classifications made are invalid, and our conclusion in Part V that we must hold 25 USCA §§ 1291-97 invalid as a whole, our consideration of plaintiffs' additional challenges to the statute may be viewed as unnecessary. However, because of the desirability of a prompt decision on all of these constitutional issues, and of economy in efforts, we feel we should decide all these claims on their merits.

The Inclusion of the Cherokee Delawares

Plaintiffs first claim that the Cherokee Delawares are Cherokee Indians by blood and hence have no right to share in awards to the Delaware Tribe. They argue that the Delawares who removed to the Indian Territory as contemplated by the Treaty of 1866, 14 Stat. 793, (*i.e.*, the "registered Delawares") became incorporated into the Cherokee Nation under the 1867 Articles of Agreement between the Cherokees and Delawares (Pl. Ex. 10, Tab I).[43] The Kansas Delawares contend that the effect of the 1867 Agreement was to abolish the Delaware Tribe as a political entity, with the registered Delawares individually becoming citizens of the Cherokee Nation and the children of these registered Delawares thereafter born becoming native blood Cherokees, citing Cherokee Nation v. Journeycake, 155 U.S. 196, and Delaware Indians v. Cherokee Nation, 193 U.S. 127, *inter alia*.

Plaintiffs conclude that the Cherokee Delaware class, being composed of present living descendants of children of registered Delawares born after the 1867 agreement, is not a class of persons who are descendants of members of the Delaware Nation as it existed in 1818 or 1854, in terms of Indian tribal ancestry, citing Halbert v. United States, 283 U.S. 753. They argue that the Cherokee Delawares are native blood Cherokee citizens who never acquired any interest in the Delaware tribal claims for the 1818 or 1854

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[43]The Agreement between the Delawares and the Cherokees provided in part as follows:

> On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as Native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

wrongs, and that they are not entitled under any constitutionally permissible rationale, to participate in the awards for either the 1818 or 1854 wrongs to the Delaware Tribe. They challenge the provisions for distribution of the awards to the Cherokee Delawares as invidious discrimination against those entitled to share in the awards, and claim deprivation of property without just compensation in violation of the Fifth Amendment.

We cannot agree that constitutional limitations prohibit distribution of an Indian Claims Commission award to all lineal descendants of the injured tribe. As stated, the claim to redress under the Act is that of the ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Ct. 1974). The function of Congress is to decide the composition of the injured tribe at the time of the wrong. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 52 (1971). We are convinced that a legislative decision to distribute an award to the lineal descendants of the injured tribe at the time of the wrong, regardless of their current tribal membership status, is well supported, considering the redress which is the goal of the Indian Claims Commission Act.

One ground for plaintiffs' argument is that the award should be treated as tribal property and governed by principles of communal ownership, applied in light of tribal history subsequent to the wrong.[44] We have already concluded

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[44]Essentially, plaintiffs' argument is this: The move to the Cherokee Nation did not abolish the Delaware national fund (which was diminished as recognized by the awards in Docket No. 337 and Nos. 72 and 298). After the 1867 move, the registered Delawares in Oklahoma and the Kansas Delawares were owners of the national fund, and, since this ownership was communal in nature, it could not be devised, transferred or inherited. On the death of the registered Delawares, their ownership interest terminated. The children of the registered Delawares, not being of Delaware blood, but of Cherokee blood, did not inherit from their Delaware Indian parents any interest in the Delaware national

that distribution of awards under the Act, which is for congressional decision, is not controlled by technical property concepts. We are satisfied that the Congress has sound ground for deciding to distribute an award to lineal descendants of the tribe injured by the wrong. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52. And as discussed in Part V, *infra*, we conclude that there are no "vested rights" related to the awards in question which must be observed in the distribution.

Plaintiff Kansas Delawares argue further that all Cherokee Delawares who, pursuant to 25 USCA §§ 991-98, participated in the award in Indian Claims Commission Docket No. 173 of some $14,000,000 to the Cherokee Tribe, are barred by 25 C.F.R. § 101.4 from participating in the awards in question here. The regulation provides in pertinent part that:

> An Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be en-

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[44] (Continued)

fund or in any claims which the prior existing Delaware tribe owned for breaches of treaties by the United States. The succeeding generations of descendants of the registered Delawares are also Cherokees, since they must claim through parents who were native Cherokees, the rule being that children belong to the tribe of their parents, not of their grandparents. Halbert v. United States, 283 U.S. 753 (1931). Plaintiffs conclude that the Cherokee Delawares, as Cherokees, have not succeeded to any rights of the prior existing Delaware tribe, and may not share in the national fund or in the claims which have matured into the awards in Docket No. 337 or Dockets Nos. 72 and 298.

We have rejected similar arguments that the distribution of awards, which is for congressional decision, is controlled by technical property concepts. Likewise, such contentions on the legal status of Cherokee Delawares and their rights under laws of descent are not dispositive of the constitutional claims. In any event, we are satisfied that despite the policy arguments against the Cherokee Delawares sharing in both Cherokee and Delaware awards, there was a sufficient nexus between the Cherokee Delawares and the injured ancestral tribe by descendancy for Congress rationally to include the Cherokee Delawares in the distribution of the awards redressing the 1818 and 1854 wrongs.

rolled and to relinquish in writing his claims to payments to the other.

More broadly, plaintiffs maintain that this rule against dual eligibility for tribal benefits is a long standing public policy. See Mandler v. United States, 52 F.2d 713, 714 (10th Cir.); F. Cohen, Handbook of Federal Indian Law, 137 (orig. ed. 1942). In view of these principles the Kansas Delawares assert there is no rational basis for the congressional decision permitting the Cherokee Delawares to share in the award to redress the Delaware wrongs of 1818 and 1854.

We must disagree. By its own terms 25 C.F.R. § 101.4 applies in circumstances where an Indian holds equal rights in two or more tribes and prevents sharing in payments made to two tribes. Even if controlling over the distribution statutes, the policy and regulation may be viewed as inapplicable on the theory that Indians, like the Cherokee Delawares, participating in the awards here are not receiving payments of two tribes, but that the participation in these awards brings compensation based on earlier circumstances when their ancestors were members of another injured tribe—or at least the Congress could rationally so conclude.

But in any event the policy and the regulation may be changed by statute, subject to constitutional limitations which we feel do apply to an exercise of congressional power over Indian legislation. We see no violation of constitutional limitations arising from a change in policy concerning sharing in two tribal benefits.

The Inclusion of the Absentee Delawares

The plaintiff Kansas Delawares further argue that the Absentee Delawares may not be validly included in distribution of the award in Dockets Nos. 72 and 298 redressing the 1854 wrong. They say that the Absentees' ancestors were not with the main body of the Delaware tribe at the time of the 1854 wrong and were not harmed by breach of the 1854 Treaty.[45] Essentially they contend that entitlement to the benefit of a treaty or to compensation for its breach depends on residency with the tribal entity at the time of entering into the treaty and at the time of the wrong, respectively, and on being subject to the obligations of tribal membership, citing Eastern Band of Cherokee Indians v. United States, 117 U.S. 288; McGhee v. Creek Nation, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856; Prairie Band of Potawatomi Indians v. United States, 165 F.Supp. 139 (Ct. Cl. 1958); and Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960). And the Kansas Delawares conclude that the unjustified inclusion of the Absentees in distribution of the award dilutes the interest of those rightfully entitled to such funds and constitutes a taking of their property without just compensation.

We are unpersuaded by the arguments. It is true that Indians who sever their tribal relationship and separate from the tribe lose their right to participate in tribal assets. Miami Tribe of Oklahoma v. United States, 281 F.2d 202, 213 (Ct. Cl. 1960). However, an Indian group absent from a main tribal body at the time of a wrong may still

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[45]Although plaintiffs do not concede that the Absentee Delawares were members of the scattered Delaware Nation in 1854, they contend that even if they were, they were not in Kansas with the main body of the tribe which made the 1854 Treaty and were not residing on the lands which were ceded by the treaty. It is further claimed that those Absentees who did enjoin the main body of the tribe in Kansas prior to 1854 are ancestors of present members of either the Cherokee Delaware class or the Kansas Delaware class.

be recognized by the tribe as retaining tribal membership, and may have a claim to participate in an award redressing a wrong to the tribe. Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct.Cl.1955). Hence it is relevant to consider what the policy of the Delaware Tribe was in 1854 with respect to recognizing a continued relationship with the Absentees.

We feel the historical materials before us are not conclusive as to whether the Absentees were considered by the tribe to have retained their membership at the time of the breach of the 1854 Treaty. The Kansas Delawares rely on historical documents allegedly showing that, as a result of absenting themselves from the main tribal body in Kansas, the Absentees had, by tribal law, ceased to participate in the tribal councils and to have any interest in tribal property.[46] Defendants, on the other hand, point to several treaty provisions and authoritative discussions of Delaware history indicating that the Absentees were recognized as members of the tribe by its main body in 154. See Article IV of the 1860 Treaty between the United States and the

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[46]Plaintiffs cite Pl. Ex. 32 (Letter from John G. Pratt, U.S. Indian Agent, to Thomas Murphy, Supt. of Indian Affairs, July 14, 1868) in support of this proposition. They further allege that the Absentees received no portion of the annuities paid to the main body of the tribe and did not participate in any of the treaty benefits accruing to the main body of the tribe, citing Pl. Ex. 32, *supra*; Pl. Ex. 145-B (Letter from John G. Pratt to Thomas Murphy, Nov. 27, 1866); Pl. Ex. 64 (Letter from A. H. McKisick, Wichita Agent, to Elias Rector, Supt. of Indian Affairs, Oct. 21, 1857, excerpt from Report of the Comm'r of Indian Affairs, 1857); Pl. Ex. 149 (Excerpt from "Registry, Allotment, Valuation, etc., Delaware Diminished Reserve, Treaty, July 4, 1866"). In particular, they argue that the Delaware national fund, into which the proceeds from the sale of the lands under the 1854 Treaty were placed, was paid out per capita to members of the Delaware nation by 1893 and that the Absentees never received any part of such fund.

There was an objection as to authentication of plaintiffs' exhibit 32, cited above, which appears to be good. Nevertheless, even considering the exhibit, our conclusion remains the same in rejecting plaintiffs' arguments in view of the treaty provisions and other documents cited which serve as an adequate and rational basis for the decision of Congress to include the Absentees in the distribution of the award.

Delaware Tribe, 12 Stat. 1129, 1130-31; S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968).[47] Moreover, we note that the Court of Claims found from its examination of the tribal history that "the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe." Delaware Tribe of Indians v. United States, *supra*, 128 F.Supp. at 399.

We feel this view is persuasive, and that the Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence. Thus, although the historical materials are not conclusive, there is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

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[47]The defendants say the Treaty of May 30, 1860 between the United States and the Delaware Tribe, 12 Stat. 1129, is evidence of such a contemporaneous understanding as to the structure of the Delaware tribe. Article I of that treaty referred back to Article 11 of the 1854 Treaty, 10 Stat. 1048, 1050, which had provided for the possible future survey and individual assignment of the residence lands left to the Delawares under the 1854 Treaty. Article I went on to provide that those lands should now be surveyed "and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres. . . ."

Article IV of the 1860 Treaty, 12 Stat. 1129, 1130-31, went on to make provision for the Absentee Delawares in the following terms:

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong (sic) to the nation in common.

Defendants contend that, by this 1860 Treaty, the ancestors of the Absentee Delaware class were recognized as members of the Delaware

V

EQUITABLE JURISDICTION AND REMEDIES

Having concluded that the classifications made in 25 USCA §§ 1291-97 for distribution of the award redressing the 1854 wrong, resulting in the exclusion of the Kansas Delawares, are invalid, it remains to consider the proper remedies and to determine whether other portions of the distribution statute may be upheld and continued in effect. These questions lead us to the remaining disputes between the parties.

First, defendants argue that if plaintiffs' allegations of a taking of their property without just compensation and without due process are true, they may be entitled to recover money from the Treasury and must present their complaint in such a suit in the Court of Claims or in the district courts. They point to 28 USCA §1505 conferring jurisdiction on the Court of Claims to hear Indian claims against the United States; to the Tucker Act, 28 USCA § 1491, granting that court jurisdiction of claims against the United States founded on the Constitution, among other

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47 (Continued)

Tribe with rights co-extensive with all other tribal members. They allege that these rights included full rights to tribal land, annuities, trust funds and interest accruing to the Delawares under former treaties, including the 1854 Treaty.

However, plaintiffs assert that Article IV of the 1860 Treaty was not an offer to allow the Absentees to share in the *Delaware national fund* if they returned, but only an offer of an *eighty acre allotment* to each Absentee if they returned. In any event, plaintiffs urge that the Absentees did not, in fact, return in response to the opportunity offered by the treaty, thus refusing to rejoin the tribe and forfeiting their right to receive land in Kansas. Plaintiffs cite Pl. Exs. 32 and 145-B in support of this contention. Further, plaintiffs argue that the 1860 Treaty is irrelevant because, under the controlling cases, merely being recognized as a part of the tribe or Nation is not sufficient grounds to establish the Absentees' claim to share in proceeds relating to the breach of the 1854 Treaty, citing Prairie Band of Potawatomi Indians v. United States, *supra*, 165 F.Supp. 139; and Miami Tribe of Oklahoma v. United States, *supra*, 281 F.2d 202.

things; and to jurisdiction conferred on the district courts by 28 USCA § 1346 to hear such claims for amounts not exceeding $10,000. Defendants argue that the only constitutional question presented is whether the challenged statutes have deprived plaintiffs of their resort to those forums; that there is no such foreclosure of remedies to recover by actions at law there; and that injunctive relief and invalidation of the statute would therefore be improper, citing Regional Rail Reorganization Act Cases, 419 U.S. 102; United States v. Causby, 328 U.S. 256; and Hurley v. Kincaid, 285 U.S. 95. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 71-75.[48]

We feel that reliance on Regional Rail Reorganization Act Cases, *supra*, is misplaced. The case involved admittedly existing property rights of the rail companies, their owners and claimants against the bankrupt estates. The Court defined the major issues as being whether an action at law under the Tucker Act will be available to recover any deficiency of constitutional dimension in compensation for the takings allegedly to be effected by the Act, and if the Tucker Act remedy is available, whether it is adequate. 419 U.S. at 121. The Court held that the Tucker Act remedies were not withdrawn, and that they were adequate to recover compensation for any "constitutional shortfall" resulting from conveyances required and, therefore, that the Regional Rail Reorganization Act was not an unconstitutional reorganization plan. *Id.* at 154-55.

However, the case involved no question of the existence of obvious property rights or vested rights of the various parties, *id.* at 122, 137, and the Tucker Act remedy was held available for monetary recovery for any inade-

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[48]Defendants argue that plaintiffs could maintain a class action in the Court of Claims under procedures analogous to those under Rule 23 F.R.Civ.P. See Quinault Allottee Association v. United States, 453 F.2d 1272 (Ct. Cl.). Thus they say no multiplicity of suits and no other like inequitable result would occurr by litigation in that forum, or in a district court suit under 28 USCA § 1346.

quacy in compensation under the Act's reorganization procedures. On the contrary, we feel that here the plaintiffs have no property or vested right in the Indian Claims Commission award in question and, hence, no remedy to recover specific monetary compensation on behalf of any plaintiff or the class of Kansas Delawares. As explained earlier, while we uphold the plaintiffs' claim under the Due Process Clause and equal protection principles incorporated by it, that constitutional claim grounded on irrational classifications is available without the premise of property or vested rights in the award.[49] We do not feel that plaintiffs have any such property or vested rights in the award as may premise a constitutional claim entitling them to specific monetary recovery under the Tucker Act. As pointed out below, after the award is entered Congress subsequently determines the beneficiaries of the award and there may not be a constitutional claim for monetary recovery with respect to the award as entered. Cf. United States v. Jim, 409 U.S. 80, 83.

For like reasons United States v. Causby, 328 U.S. 256, and Hurley v. Kincaid, 285 U.S. 95 are not in point, since they also involved admittedly existing property rights whose taking was compensable by recoveries against the United States.

Since we conclude that the plaintiffs here have no property or vested rights in the award, we feel that they have no remedy at law for specific monetary recovery under the Tucker Act, although they do have a good claim for protection against the irrational statutory classification and exclusion. We are persuaded we should consider and

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[49]Defendants argue that the Court of Claims does give plenary consideration to claims of arbitrary and invidious discrimination, relying on Fredrick v. United States, 507 F.2d 1264, 1266, (Ct. Cl.), saying that all claims of plaintiffs must be put before the Court of Claims. Again, however, the *Fredrick* case involved a claim of a statutory right to employment and monetary recovery which distinguishes it from our case where no such rights in the award exist.

uphold that constitutional claim on its merits and grant equitable and declaratory relief, there being no full and adequate remedy at law and no reason to avoid a prompt decision. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585; see Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 780.

Our conclusion that the plaintiffs here have no vested or property rights in the award, as they claim, is based on the special procedures of the Indian Claims Commission, discussed earlier. Under those procedures the Commission's awards determine only the identification of the injured tribal entity, making plain the time of the wrong and the injured group, and do not pre-determine the persons who will share the award; later the Congress determines the composition of the injured tribal entity and the beneficiaries of the award. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 48, 51-52. In addition, the Congress decides on procedures for the subsequent distribution and whether portions of the fund should be held in trust for the Indians' benefit. *E.g.*, 25 USCA §§ 1293 and 1294. In light of these undecided points remaining for congressional decision after entry of the Commission's awards, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination.

Finally, we must determine the proper disposition to make in view of our conclusions concerning the validity of the distribution statutes. Of course, since the Act distributing the award redressing the 1818 wrong is being upheld, the interlocutory restraint affecting the remaining portion of that award should be vacated, and we will grant a declaratory judgment of the validity of 25 USCA §§ 1181-86 and deny all other relief sought in connection with the award in Docket No. 337 which that statute distributes.

We have concluded that the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97,

contains irrational classifications, resulting in an invalid underinclusion. Jimenez v. Weinberger, 417 U.S. 628, 637. In such circumstances there are two general alternatives: the court may declare the statute invalid as a whole, or it may extend its coverage to include those aggrieved by the exclusion. See Welsh v. United States, 398 U.S. 333, 361 (Harlan, J. concurring); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir.), cert. denied, 412 U.S. 906. While in some cases involving a deeply imbedded policy there are compelling reasons to make the "necessary statutory repairs," Welsh v. United States, *supra*, 398 U.S. at 366, extending the coverage of the statute and saving its validity, we feel that we may not do so here.

There is no separability clause in the statute. The absence of such a clause may not foreclose the exercise of discretion to the end that the legislative provisions may be repaired and saved. *Id.* at 366. Here the difficulty with repair is that the remainder of the statute does not contain general provisions easily adaptable to an extension of the statute's coverage. See Moritz v. Commissioner of Internal Revenue, *supra*, 469 F.2d at 470. Moreover, even if repairs by an extension of coverage were possible, we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares.

In view of these difficulties and the absence of a separability clause, we conclude we should follow the general presumption that is observed where a separability clause is not provided, and hold the statute invalid as a whole. See Carter v. Carter Coal Co., 298 U.S. 238, 312. This disposition will permit further congressional consideration of a desired distribution enactment as a whole, free of the invalid exclusion.

In sum, we conclude that we should adjudge the statute distributing the award redressing the 1818 wrong, 25 USCA §§ 1181-86, valid in all respects. The preliminary restraint against distribution of the remainder of that award will be vacated, and all relief sought by the plaintiffs with respect to that award will be denied. With respect to the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97, we are entering our decree declaring that the provisions including the Cherokee Delawares and the Absentee Delawares in the distributive scheme are valid, but that the classifications drawn and the resulting exclusion of the Kansas Delawares render this distribution statute invalid as a whole, and we restrain distribution by the Secretary under that statute.

We find and conclude that there is a case of actual controversy within the jurisdiction of the court, appropriate for entry of a declaratory judgment determining the rights and legal relations of the parties and classes involved. The funds appropriated to satisfy the award in Indian Claims Commission Dockets Nos. 72 and 298, and the increments of interest thereon, are under the control of the Defendant Secretary and his agents and employees, and are required to be distributed and credited pursuant to the distribution statute which we hold invalid. Unless equitable relief is granted, such distribution and crediting will occur and irreparable harm to the plaintiffs and the plaintiff Kansas Delaware class will result. Therefore declaratory and equitable relief should be granted in connection with said award, as provided in our judgment.

Since our earlier orders were entered denying motions, and the filing of answers to the complaints, several additional motions have been filed by the parties for additional relief. We conclude that these motions should all be denied for lack of merit or because our conclusions and our decree render all necessary and proper relief.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

APPENDIX

A

In the transcript of the hearing before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, the following remarks appear between Mr. Pruner, a member of the Tribal Council for the Absentee Delaware Tribe; Congressman Edmondson of the Subcommittee, who presided; and Mr. Townsend of the Delaware Business Committee for the Cherokee Delawares, (House Subcomm. Hearings *supra* n. 27, at 78-80):

> Mr. Pruner. To clarify that one point further, Myrtle Holder and Exendine are members of our tribe—
>
> Mr. Edmondson. They did not sue in that capacity, they sued in the capacity as class litigants for the Delaware Nation.
>
> Mr. Pruner. Yes.
>
> Mr. Edmondson. I can understand Counsel's reason for having drafted it that way, because he wanted a provision that would cover the waterfront. And he got it covered with the judgment. *Of course we have the task of defining just who the Delaware Nation in 1854 included, in addition to what you have before us here today as Plaintiffs representing the two Oklahoma groups.* And I for one am certainly ready and willing to exclude anybody who is a member of the Delaware

Nation of 1854 who went elsewhere and participated in a judgment as a member of another tribe. *But I have some difficulty about a person who is a descendant of that Delaware Nation of 1854 who went elsewhere and has not affiliated with another tribe and participated in a judgment from another tribe.* It poses a problem for me as a very biased Oklahoman on the subject. And I think you will probably have more trouble with non-Oklahomans than you do with Oklahomans.

Mr. Rochmes. *Mr. Chairman, we do not think there are any such. We know the Bureau maintains there are. We think that all those people either are on those rolls or are eligible for the rolls at the very times at which the rolls were made.*

Mr. Edmondson. If you do not think there are any you would have no objection to our including as an eligible person who can prove he is a lineal descendant of someone who was a member of the Delaware Nation in 1854, and who had not participated in any other tribal judgment?

Mr. Rochmes. I think you would have to draft tougher standards than that, because the Bureau people have already made it known to us that they intend to include people who we think clearly are not Delawares and were not part of the Delaware Nation as of that time.

Mr. Edmondson. Then they would have to prove that they are descendants of Delawares.

Mr. Rochmes. Yes. But the Bureau is already saved [sic] with the proof, as for example, that the Christian Munsees were Delawares as of this time. And we think the evidence which saves [sic] them would not save [sic] a court and would not save [sic] you, perhaps. (emphasis added)

B

Defendants point to several statements in the legislative history which they rely on as showing that Congress was aware that it might be eliminating some lineal descendants of the 1854 Delaware Nation in enacting the narrower provisions of 25 USCA § 1292. The first is contained in the Statement of Louis L. Rochmes, tribal attorney for the Cherokee Delawares group, (attached to the House Subcomm. Hearings, *supra* n. 27 at 45 ff).

That Statement reads, in part, as follows:

> This statement is submitted in support of the [Cherokee and Absentee Delaware] tribes' position on H.R. 5200.
>
> In substance that position is that the bill should provide for the division of the funds between the two tribes, to the exclusion of non-Delawares.
>
> Discretion to effect another division has been requested by the Bureau of Indian Affairs . . . The Bureau proposes to conduct a search among the Stockbridge-Munsee Community of Wisconsin for those descendants of the "Emigrant New York Indians" who, it is asserted, "were Delawares who had previously absented themselves from the main body of the tribe" *and also to search for others who, it is hypothesized, "may also be descendants of members of the Delaware Nation in 1854."* These are suppositions not based on fact. I was associated with counsel for the plaintiffs in the Emigrant New York Indian case, and am familiar with the evidence adduced in that case. . . . There was no evidence of Delawares among the Emigrant New York Indians. . . .
>
> Even if these suppositions were based on fact, they would not justify the Bureau's position. The Indian Claims Commission Act is intended expressly for the benefit of existing Indian tribes, bands and other iden-

tifiable groups, and a search for individual descendants who may have elected to change their tribal affiliation is unwarranted. . . .

* * *

The Delaware tribes are particularly concerned with an opinion expressed by Bureau representatives. . . . This is the opinion that a group of Munsee Indians living in Kansas, sometimes known as the Christian Indians, sometimes as the Christian Munsees, and more recently as the Chippewa Munsees, are entitled to be regarded as Delaware for the purpose of sharing in Delaware judgment funds, and particularly in Dockets 72 and 298. (emphasis added)

Defendants point to the mention of "others" who may also be descendants of members of the Delaware Nation in 1854. However, Mr. Rochmes states thereafter that the supposition that there are any "other" such descendants "is not based on fact." The statement as a whole focuses on the question of the possible inclusion of various Munsee Indians in Dockets Nos. 72 and 298, while making no reference to the Kansas Delawares or any group of lineal descendants of true members of the Delaware Nation in 1854 who might be excluded from the judgment by deletion of the "lineal descendants" provision. Mr. Rochmes' testified later before the House Subcommittee on Indian Affairs, to which this statement was made, that all true descendants of the Delaware Nation of 1854 who had not affiliated with another tribe or participated in a judgment to another tribe would be covered by the distribution provision proposed by the Cherokee and Absentee Delawares. See Part A of this Appendix.

A second statement to which defendants refer is contained in a letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Caspar W. Weinberger, Director, Office of Management and Budget, dated September 28,

1972, which states the views of the Department of the Interior on H.R. 14267. That letter discusses the differences between H.R. 14267 and H.R. 5200 and, in regard to H.R. 14267's reliance solely upon the 1906 and 1940 rolls, states: "Although, unfortunately, they [the two rolls] do not include a few Delaware descendants who do not reside in Oklahoma, we consider them to be acceptable rolls." We note however, that this letter was written after H.R. 14267 had passed both houses of Congress to give the Department of the Interior's recommendation as to whether the President should approve the bill.

Third, defendants point to a report written by the Department of the Interior which was included in the House Report accompanying H.R. 16402 (the bill for distribution of the award in Docket No. 337), wherein the Department stated (H.R. Rep. No. 1555, 92d Cong., 2d Sess. 3-4 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 3)):

> There are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who was not presently affiliated with either of the Oklahoma Delaware groups. Some we believe, are affiliated with the Stockbridge-Munsee Community in Wisconsin and *others are not affiliated with any tribal group under federal supervision.* In view of the amalgamation of the Delawares with other Indians and the many unique and complex problems encountered in identifying the ultimate beneficiaries of this award, a brief history of the Delaware Nation is enclosed. (emphasis added)

We cannot agree that this earlier, 1968 Departmental reference to "others" (i.e., other lineal descendants not affiliated with any tribal group) served as any notice to Congress of the existence of the Kansas Delawares, especially in view of the fact that the history the Department attached to its report dealt extensively with Munsee affiliations.

In its history the Department stated (*Id.* at 10):

> The *majority* of Delaware Indians who moved on to the Kansas reserve remained until 1867. By the terms of an April 8, 1867, agreement concluded between these Delawares in Kansas and the Cherokee in Oklahoma, the Delaware removed to Indian territory and reside today as Cherokee Delaware in northeastern Oklahoma. (emphasis added)

From this and other exhibits defendants request a finding that:

> Congress was aware, from 1968 forward, that the appropriation and distribution legislation which it enacted to pay the Final Awards of the Indian Claims Commission in *both* Indian Claims Commission Docket No. 337 and Indian Claims Commission Docket No. 72 and 298, would not provide payment to every person who could claim to be, ethnologically, a 'Delaware'. The Department of Interior's Report to Congress, a part of the legislative history of House Report No. 1555, 90th Congress, 2d Sess., the Report which accompanied H.R. 16402, the Bill which eventually became Public Law 90-508 (25 U.S.C. 1181-86) (Sec. Of Int. and D.T.I. No 3) reflects that the Bill would provide for payment to the 'majority' of modern-day Delaware Indians.

Defendants' Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

We are not persuaded that the 1968 or 1972 legislative history, or both combined, support such an inference or indicate any awareness that the 1972 statute (25 USCA §§ 1291-97) would exclude a group such as the Kansas Delawares who were lineal descendants of the 1854 Delaware tribe.

Defendants also cite the House Committee Report accompanying H.R. 14267, (the bill for distribution of the

award in Dockets Nos. 72 and 298) and emphasize the statement therein that (H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6)):

> The recommendations of the Department [of the Interior] regarding the preparation of the updated roll [of those who had participated in the Docket No. 337 judgment] were not adopted by the committee because they were strenuously opposed by both of the Indian groups concerned, and *the Indian position is, in the opinion of the committee, a defensible one.* (emphasis added)

However, as stated above, it does not appear that the House Committee was aware that the "Indian position" it termed defensible would result in the exclusion of lineal descendants of persons who were members of the Delaware Tribe in Kansas in 1854.

Finally, defendants have pointed to the following colloquy between Senator Bellmon and Mr. John O. Crow, then Acting Commissioner of the Bureau of Indian Affairs, which occurred during the course of the Senate subcommittee hearings on distribution legislation for the award in Dockets Nos. 72 and 298, at which Senator Bellmon presided:

> Senator Bellmon. As you know, I am from Oklahoma and I am aware that both Delaware groups oppose S. 1067, but favor H.R. 14267, which was approved by the House. Can you give me your reasoning for favoring S. 1067 or H.R. 14267?
>
> * * *
>
> Senator Bellmon. Do you know the basis for the objections to S. 1067?
>
> Mr. Crow. I think the tribal delegates can tell you much better than I. However, I think that the primary

difference, perhaps, is in the definition of persons excluded from sharing in the judgment.

Senator Bellmon. Do you have any information as to how many would be excluded under H.R. 14267 that would have been included in S. 1067?

Mr. Crow. *It is most difficult to say. We think the number would be quite small. We can't see any possibility of it being more than 200 people.*[50]

Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972) (Pl. Ex. 5). Defendants assert that this colloquy demonstrates that both the Senate and the House were aware that the distribution statute would not include all possible Delaware claimants.

We note Senator Bellmon's question to Mr. Crow further in the same hearing. *Id.* at 40.

Senator Bellmon. If the Congress were to take action which excluded the *non-Oklahoma Delawares* from sharing in this judgment, do you see any possible future legal implications for the federal government? (emphasis added)

Mr. Crow. Mr. Chairman, I don't.

Subsequent testimony by tribal delegates in the same hearing makes it clear that the impression was that the persons that would have been included by S. 1067 (to which Mr. Crow made reference, *supra*) and the "non-Oklahoma Delawares" that were being considered for exclusion (to which Senator Bellmon made reference, *supra*) were the Munsee Indians.

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[50]It will be recalled that S. 1067 would have updated the Docket No. 337 roll to include lineal descendants of the Delaware Nation as it existed in 1854. H.R. 14267 was essentially the bill enacted.

Mr. Townsend. Mr. Chairman, I am Bruce Miller Townsend, Chairman of the Delaware Tribal Business Committee. To my right is Mr. Lawrence Snake who is President of the Absentee Delaware Tribe of Western Oklahoma. . . .

* * *

When S. 1067 was first introduced into the Senate of the United States, there were problems at that time that were latent and did not come to the fore until a later time. They didn't take very long. *Id.* at 42.

* * *

The crux of the matter is the difference between the departmental report, as Mr. Crow has stated, his inclusion of a foreign group of Indians in Delaware matters, that is the Munsee Tribe, and the various names by which it goes. *Id.* at 44.

* * *

Senator Bellmon. . . .

Only one further question. This is the tough one, I am sure, for all of you. But if Congress moves ahead to approve legislation along the lines of the House-passed bill, which would exclude *the non-Oklahoma Delawares, the Munsees,* from sharing in its present judgment, do you foresee any future legal implications for the federal government? (emphasis added)

Mr. Townsend. Mr. Chairman, I am an attorney at law and I don't know that this gives me any greater insight than anybody who is not an attorney, but my way of knowledge—if there has been any legal problem that could face the Bureau of Indian Affairs, it would be a puppy that they brought home and has grown into a ferocious beast by now.

I say this by reason of the fact that any problems that could be brought out in the way of litigation has been fostered, promulgated, by the unilateral action of

the Bureau. I can see none, but there have been these 1,552 applications filed. The Bureau beat the bushes to get them filed and, as far as whether or not any of those people would be interested in instituting litigation, I would say that based upon their track record the chances are nil.

I say that because of the fact that they did not respond to my brief in 1966. They did not respond any further than discussing the matter with their counsel subsequent to that time. No one was present at the House of Representatives Subcommittee on Indian Affairs hearing in 1968. No member of the Munsee Tribe was present at the House Subcommittee hearing last November which was passed over into this March. No members of the Munsee Tribe, nor did they have representatives at those meetings or the March meeting before the House.

Of course, anyone can go to a lawyer, draw up a paper and call it a lawsuit, but I don't think this is what your question implies. I don't foresee the possibility of a meritorious lawsuit in this matter.

Senator Bellmon. Mr. Snake.

Mr. Snake. Mr. Chairman, I am of the same opinion. Since all of these claims have been in hearing, we have never to this date had any Munsee to testify. So I am of the same opinion that there would not be any lawsuit. *Id.* at 69-71.

C

Article IX of the 1866 Treaty (14 Stat. 793, 796) provides:

Article IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens

of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore

provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

The Act of 1874 (18 Stat. 146, 175) appropriated an amount for payment of interest on the Delaware general fund, then added:

For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the

money-credits of said tribe, and thirty-three thousand and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: Provided, That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: Provided, That in the case of deceased persons, the Secretary of the Interior shall make payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee-simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them; and the lands designated in such patent shall enure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

DAUGHERTY, District Judge concurring part and dissenting in part:

I concur in part and dissent in part. I concur in that part of the majority opinion which results in upholding the distribution of funds ordered by the Congress in 25 U.S.C. §1181-6 and rejecting Plaintiffs' attacks thereon. However, I must dissent to that part of the majority opinion which declares the distribution of funds ordered by the Congress in 25 U.S.C. §1291-7 to be void and unconstitutional.

PLENARY POWER OF CONGRESS

I consider such distribution of funds to the Indian Tribes and members on their rolls as ordered by Congress in 25 U.S.C. §1291-7 to be within the plenary power of Congress in relation to Indians and not justiciable. In *Lone Wolf* v. *Hitchcock*, 187 U.S. 550, 49 L. Ed. 299, 23 S.Ct. 216 (1903) it was held:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

This case has not been reversed and the decisions following it are too numerous to cite. However, as late as 1973 our Court of Appeals in *National Indian Youth Counc., Int. Ind. Sch. Chap.* v. *Bruce*, 485 F. 2d 97 (Tenth Cir. 1973) held:

> "District courts are also without jurisdiction when confronted with non-justiciable political questions, such as determining the status of Indian tribes. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This court has recognized the plenary

power of Congress to control and manage the affairs of its Indian wards. Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119 (1949); Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931)."

Also see *Groundhog* v. *Keeler*, 442 F. 2d 674 (Tenth Cir. 1971).

Congress did not have to create the Indian Claims Commission, 25 U.S.C. §§70 et seq., to allow Indians to present claims for redress for past Government wrongs. Nor was Congress required to appropriate and distribute funds regarding a final award recommended by the Commission. Congress by provisions in the Indian Claims Commission Act reserved unto itself the matter of determining the distribution to be made of appropriated funds in payment of awards recommended by the Commission. All of this is pursuant to the unique plenary authority of Congress over Indians. It is therefore my belief that the attacks made herein on the distribution of funds to Indians as ordered by the Acts of Congress involved herein are non-justiciable. I have not found a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein.

TREATY PROVISIONS

In addition, the Treaty itself, which is the foundation of Plaintiffs' alleged rights, gives full authority and discretion to Congress in the matter of the distribution of funds derived from the land sales when it provides in Article 8 in part as follows:

> " * * * and *in distributing the funds to the (Delaware) people*, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, * * * but *Congress*

may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem *just and proper.*" (Emphasis added)

Thus, Congress had treaty authority with the Delaware Nation (as well as plenary power) to use its wisdom in the distribution of the funds involved herein to the Delaware people.

APPROPRIATED FUNDS

Furthermore, I am unable to discard the proposition urged by the Defendants that the Acts of Congress under attack are appropriations of public funds within the meaning of Article 1, Section 9, Clause 7, United States Constitution, and as such may not be redesignated by the Courts under the pronouncement of *United States* v. *Price*, 116 U.S. 43, 29 L.Ed. 541, 6 S.Ct. 235 (1885). This early case and those following it teach that no discretion is vested in the Secretary of the Treasury "or in any Court" to determine the correctness of either the amount or the designee of a payment ordered by an Act of Congress. Congress by 25 U.S.C. §70u reserved unto itself exclusive power to distribute, or to decline to distribute, the appropriated funds necessary to pay any final award recommended by the Indian Claims Commission. The majority opinion has the effect of ordering a redesignation of the recipients of appropriated funds from those designated by the Congress.

RATIONALITY

Also, there is the matter of whether there is rationality in the Acts passed by Congress which the majority strikes down. Ordinarily, determination and classification laws are upheld if there is a rational basis for the same. *United States* v. *DePugh*, 266 F. Supp. 453 (W.D. Mo. 1967), affm'd.

393 F.2d 367 (Eighth Cir. 1968, cert. den. 393 U.S. 832.[1] At one point in this litigation I agreed (without abandoning my position regarding the plenary power of Congress, the provisions of the Treaty involved granting Congress full power regarding the distribution of funds pertaining to the sale of the Indian lands and that the funds here distributed by Congress are an appropriation of public funds) to hear evidence and arguments and receive Briefs on the rationality question. As I read the majority opinion it turns on an alleged lack of rationality or lack of a rational basis for the Congress to exclude the so-called Kansas Delawares from the distribution of funds ordered by 25 U.S.C. §1291-7. I find in the record an abundance of rationality to support the distribution of funds made by Congress in these Acts and do so differently than in 25 U.S.C. §1181-6.

The Indian Claims Commission is without authority to fix the distribution to be made of their recommended awards. See 25 U.S.C. 70r as to the contents of the final determination of the Commission. "How the award is to be paid and precisely who can participate * * * * * are questions for Congressional and administrative determination." *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct.Cl. 570, 372 F. 2d 951 at page 957 (1967); *Peoria Tribe of Okla-*

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[1]This case provides:

"This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U.S. 29, 32. 83 S.Ct. 594, 9 L.Ed. 561 (1963) rehearing denied 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed. 2d 13; McMahon v. City of Dubuque, Iowa, 255 F.2d 154, 160 (8th Cir. 1958) cert. den. 358 U.S. 833, 79 S.Ct. 53, 3 L.Ed. 2d 70. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Egan v. United States, 137 F.2d 369, 375 (8th Cir. 1943), cert. den. 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N.D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U.S. 334, 57 S.Ct. 277, 81 L.Ed. 270 (1937)."

homa v. *United States*, 169 Ct.Cl. 1009 at page 1011-12 (1965). But the fact is that the Commission nevertheless recommended or at least suggested to whom their recommended awards in both CD 337 and CD 72 and CD 298 shou'd be distributed. In CD 337 the Commission announced the idea of a distribution to individuals who could establish requisite Delaware blood entitlement and did so notwithstanding the obvious fact that the lands involved were tribal lands and not individual lands.[2] Congress adopted or followed this suggested distribution in its appropriation and distribution enactments and such problems, turmoil, confusion and delay ensued that these funds have not yet been fully distributed! In CD 72 and 298 the Commission recommended or suggested (and again the Congress followed the same) that the funds be distributed to the two recognized Tribes of Delaware Indians and members on their rolls which is what the Commission should have recommended or suggested and the Congress should have done in CD 337. It is believed fair to conclude that this change in attitude about distribution in both the Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong. This is a rational basis for the decision of the Congress exercised in enacting 25 U.S.C. §1291-7. But there is more rationality.

The so-called Kansas Delawares on the one hand and the Cherokee (or Oklahoma) Delawares and the Absentee Delawares on the other hand over a hundred years ago came to a parting of the ways. The Delaware Indian Nation ceded their lands in Kansas, moved to Oklahoma from Kansas, affiliated with the Cherokee Nation in Oklahoma and the Caddo-Wichita Indian Tribe in Oklahoma, its individuals maintained Indian citizenship, and they have main-

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[2]Public lands and public funds of Indian Tribes are tribal properties and are not held in individual ownership. *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 315 F.2d 906 (1963).

tained tribal recognition and organization for over 100 years. On forty-one (41) occasions since removal to Oklahoma Congress has recognized these Oklahoma Delaware Tribes in legislative measures. The so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation, individually took their proportionate share of trust funds held by the Delaware Tribe, took United States citizenship, renounced Delaware citizenship, obtained provisions allowing their minor children to take United States citizenship (which eventually occurred) and fully divorced themselves from the Delaware Tribe which left Kansas for parts in Oklahoma. This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes and to those on the rolls of these recognized Delaware Tribes, took land in Kansas, their share of tribal funds and became United States citizens. In *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202 (Ct. Cm. 1960) it is held:

> "The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309-312, 6 S.Ct. 718, 29 L.Ed. 880; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2-57, decided July 16, 1958, 165 F. Supp. 139, 143 Ct. Cl.—(slip opinion, pp. 12 and 20)."

And it seems to me that the majority overlooks another significant distinction which is present with reference to the distribution made by Congress in 25 U.S.C. §1181-6 (which the majority upholds) and the distribution made by Congress in 25 U.S.C. §1291-7 (which the majority de-

clares to be unconstitutional and void as possessing no rational basis) which provides rationality for the later distribution being different from the earlier distribution. The distribution made in 25 U.S.C. §1181-6 pertained to the sale of Delaware lands in Indiana. The distribution made in 25 U.S.C. §1291-7 pertained to the sale of Delaware lands in Kansas. After ceding the lands in Indiana the Delawares moved to Missouri and thence to Kansas. None stayed in Indiana, none took an allotment of land in Indiana in fee, none took their proportionate share of tribal funds and none took United States citizenship. The Delawares in Kansas maintained tribal identity. Whereas, when the Kansas lands were ceded a vastly different turn of events ensued as above pointed out and which will not be repeated. This significant difference provides rationality for the distribution made in 25 U.S.C. §1291-7 as distinguished from that made in the earlier distribution.

Also there was legal precedent for the distribution made by Congress in the distribution ordered in CD 72 and 298. When an award became payable to the Delaware Tribe for a strip of land in Kansas known as the Delaware "outlet" it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares, the same as the distribution of Congress in 25 U.S.C. §1291-7. See *United States* v. *Delaware Tribe of Indians*, 427 F. 2d 1218 (Ct. Cm. 1970).

Another legal precedent for the distinction made by the Congress is the ruling in *Minnesota-Chippewa Tribe* v. *United States*, 161 Ct. Cm. 258, 315 F. 2d 906 (1963) which held that public lands and public funds of Indian tribes are tribal properties and are not held in individual ownership. The majority opinion acknowledges that the so-called Kansas Delawares do not have a vested interest in the fund. This is further rational for Congress to distribute the moneys derived from the sale of tribal lands to be paid

in part (10%) to the existing and recognized Tribes and the balance to those members on the rolls of existing and recognized Tribes to the exclusion of those not members of the Tribes nor on their rolls and who over a 100 years ago had taken individual allotments of tribal land in Kansas in fee simple, had taken their individual proportionate part of the existing tribal funds, left the Tribe, renounced Tribal membership and took United States citizenship.

How much rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs? Assuming that some rationale must be present, which is doubted as to the exercise of the unique plenary power of Congress in Indian matters, there is in any event an abundance shown by the record. Congress had before it another Bill which would have distributed CD 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337. Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls. Congress distributed appropriated funds by 25 U.S.C. §1291-7 with full knowledge that it was a different distribution from that made by 25 U.S.C. §1181-6. This was not a Congressional mistake. It was deliberate Congressional action and in the face thereof the majority would strike down 25 U.S.C. §1291-7 and advise Congress that it erred and must legislate again and in doing so must include the so-called Kansas Delawares but need not include the Munsee Delawares or the Christian Delawares or any other Delawares not belonging to the recognized Oklahoma Tribes. What will be the result if Congress declines to permit the Court to legislate for it regarding its plenary power in Indian affairs? It could be that Congress will decline to change its position for it acted rightly and within its authority or perhaps Congress will balk and refuse to distribute anything to anyone which

is also within its power under the Indian Claims Commission Act. It is my belief and position that if in fact Congress has made a plain and grievous error regarding the so-called Kansas Delawares in the passage of 25 U.S.C. §1291-7 (which I do not believe to be the case) upon petition and showing to the Congress by those aggrieved the Congress may correct the error and by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
NOV 1 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Walter W. Mounts*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE	)	No. CIV-73-586-E

MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE,	)	
Defendants,	)	
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,	)	
Plaintiffs,	)	
v.	)	No. CIV-74-368-D
ROGERS B. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America,	)	
Defendant,	)	
THE DELAWARE TRIBE OF INDIANS,	)	
Intervenor.	)	

ORDER

Upon consideration of pending motions in these consolidated actions, and the arguments and briefs submitted thereon, it is ORDERED that:

The pending motion to dismiss filed by the defendant United States in No. Civ. 73—586-E, Western District of Oklahoma, entitled Weeks v. United States, et al, is sustained, the action as against the Government being an uncontested suit not within the jurisdiction of the court. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141-42;

United States v. Sherwood, 312 U.S. 584; see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687. The pending motions to dismiss in both of the above entitled actions filed by defendant Morton and all defendants other than the United States are denied.

The pending motion of plaintiff for summary judgment and the motion for partial summary judgment by defendant Delaware Tribal Business Committee and defendants other than the United States and defendant Morton, both pending in No. 73-586-E, Western District of Oklahoma, entitled Wanda June Weeks v. United States, et al, are overruled, it being the view of the Court that there may be genuine issues as to some material facts and that summary judgment procedures in said action are inappropriate.

The plaintiff Weeks in No. 73-586-E, Western District of Oklahoma has moved that said action proceed as a class action on behalf of the Kansas Delawares. In No. 73-C-311, Northern District of Oklahoma, now transferred to this district and consolidated with No. 73-586-E, the complaint requests that the action proceed also on behalf of the Kansas Delawares. In addition the motion of plaintiff Weeks in No. 73-586-E, requests that said action proceed against specified defendants as representatives of the Cherokee Delawares and the Absentee Delawares, respectively.

Pursuant to Rule 23(a), F.R Civ.P., the court finds that the plaintiff class consisting of the Kansas Delawares, and the defendant classes consisting of the Cherokee Delawares and the Absentee Delawares are so numerous that joinder of all members thereof is impracticable; that there are questions of law or fact common to each class relating to the rights of said class in regard to the claim of unconstitutionality under 25 U.S.C.A. § 1291 and related statutes; that the claims of the representative parties plaintiff and defendant are typical of the claims of their respective classes whose alleged rights are involved herein; and that

the representative parties plaintiff and defendant will fairly and adequately protect the interests of the respective classes.

The court further finds that this action may proceed as a class action on behalf of the plaintiff class and against the defendant classes both pursuant to Rule 23(b)(1)(B) and Rule 23(b)(2), since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and since the defendant Morton and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole. See Cranston v. Freeman, 290 F.Supp. 785 (N.D.N.Y.), rev'd on other grounds *sub nom.* Cranston v. Hardin, 428 F.2d 822 (2d Cir.), cert. denied, 401 U.S. 949; Rodriguez v. Swank, 318 F.Supp. 289, 293-295 (N.D. Ill.), aff'd., 403 U.S. 901.

Pursuant to Rule 23(d), F.R.Civ.P., the court ORDERS that there be individual notice by certified mail to all members of the Kansas Delaware class who can be identified through reasonable effort, said notice to be mailed within 30 days hereafter, advising each member that these suits are being maintained as class actions for all Kansas Delawares and describing the nature of the suits; that the judgment, whether favorable or not to him or her, will be binding on all members of said Kansas Delaware class; and that any member may, if he or she desires, enter his or her separate appearance, on his or her own behalf or through counsel, within 45 days after the date of this order.

The court having granted the motions for class actions on behalf of the plaintiff Kansas Delawares in both of the above entitled cases, it is directed that the plaintiffs, by counsel, in both actions confer promptly with a view to

agreement upon arrangements and procedures for notice and all other matters necessary for maintenance of these suits as class actions for the plaintiff Kansas Delawares. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary orders prescribing responsibilities as between the parties and counsel in connection with class action procedures. Such application to the Chief Judge should be made within 15 days from the date hereof.

As to the defendant classes of the Cherokee Delawares and the Absentee Delawares, in its discretion under 23(d), F.R.Civ.P., the court determines that personal notice to all members of said defendant classes is not necessary. Unlike the Kansas Delawares who have not had designated representatives and regular communications from them, it appears that the Cherokee Delawares and the Absentee Delawares have been represented by the parties named as defendants in No. 73-586-E, entitled Weeks v. United States, et al. It is, therefore, ORDERED that notice to the defendant classes, the Cherokee Delawares and the Absentee Delawares, be given within 30 days hereof by publication in a tribal business letter or paper, or in a newspaper of general circulation in the city or town designated by the defendant representatives of said classes as having the most circulation to the members thereof. Said notice shall contain the same notifications and provisions for optional separate appearances, by such persons themselves or through counsel, as are provided hereinabove in the notice to members of the Kansas Delaware class.

It is directed that the plaintiffs, by counsel, and the defendant representatives of the Cherokee Delawares and the Absentee Delawares, by counsel, also confer promptly with a view to agreement on an arrangement of procedures for such notice. If there be any dispute concerning the same, the parties are directed to apply to the Honorable

Fred Daugherty, Chief Judge of this district, for any necessary orders. Such application should be made within 15 days from the date hereof.

The court, having disposed of pending motions and applications preliminary to a final hearing on the merits, advises the parties that at an early date after completion of said notices and expiration of the time for additional appearances, the court will hold a hearing on the merits of these actions on all disputed issues of fact, including the constitutional issue as to whether there is a rational basis under constitutional standards for the provisions of 25 U.S.C.A. § 1291 and the statutes related thereto, excluding the Kansas Delawares from participation in the distribution of the judgment funds in dispute in these cases, on which issue, among others, the court will receive all competent proof for final determination on the merits, and final arguments on the merits.

DATED THIS 1st DAY OF NOVEMBER, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 1, 1974

By: Adelaide Holston, Deputy

[APPENDIX]

FILED
NOV 4 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
By (s) *Judith E. Morgan*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. ROGERS D. MORTON, individually and in his capacity as Secretary of the	)	No. CIV-74-368-D

Interior of the United States of America,	)
Defendant,	)
THE DELAWARE TRIBE OF INDIANS,	)
Intervenor.	)

AMENDMENT TO ORDER

On its own motion the court hereby amends its order entered November 1, 1974, in these consolidated actions to provide further as follows:

It is further ORDERED that the cost of notice by certified mail to the plaintiff class of the Kansas Delawares and the cost of notice by publication to the defendant Cherokee Delaware class and the defendant Absentee Delaware class shall be borne by the plaintiff. Cf. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804. Prior to such notice by certified mail and publication, the proposed form of such notice and the proposed manner of publication shall be submitted to the Honorable Fred Daugherty, Chief Judge of the Western District of Oklahoma, for approval after service of a copy thereof on opposing counsel, together with notice stating when the same shall be presented to Chief Judge Daugherty.

DATED this 4th day of November, 1974.

s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District
Of Oklahoma

s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 4, 1974

By: Adelaide Holston, Deputy

FILED
NOV 18 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Joyce Faye Shipp*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	)	
v.	)	No. CIV-74-368-D
ROGERS D. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America, Defendant,	)	
THE DELAWARE TRIBE OF INDIANS, Intervenor.	)	

ORDER APPROVING FORMS OF CLASS ACTION NOTICE AND PROCEDURES FOR GIVING NOTICE

This matter comes on to be heard this 18th day of November, 1974, for the purpose of entry of an Order approving forms of class action notice, approving the definitions of the respective classes, and approving procedures for giving said notice, the parties being present by counsel. The Court, having examined the suggested forms of notice to the respective classes herein, having heard the arguments of counsel and being fully advised,

IT IS ORDERED THAT the class action notice to the members of the Kansas Delaware class shall be given in the form attached hereto as Exhibit "A."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Cherokee Delaware class shall be in the form attached hereto as Exhibit "B."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Absentee Delaware class shall be in the form attached hereto as Exhibit "C."

IT IS FURTHER ORDERED THAT the notice by certified mail to the members of the Kansas Delaware class shall be mailed on or before Friday, November 22, 1974, and that a single notice may be sent to all adults and minors living at any one address.

IT IS FURTHER ORDERED THAT notice by publication to the Cherokee Delaware class shall be given in the Tulsa World.

IT IS FURTHER ORDERED THAT notice by publication to the Absentee Delaware class shall be given in the Anadarko Daily News.

IT IS FURTHER ORDERED THAT the notices by publication shall be published in the Sunday, November 24, 1974 issues of the respective newspapers.

IT IS FURTHER ORDERED THAT Plaintiff shall bear the cost of publication of the notices as described above.

Dated this 18th day of November, 1974.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELA-	)	No. CIV-73-586-E

WARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE,

Defendants,

and

(CONSOLIDATED)

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,

Plaintiffs,

v.

No. CIV-74-368-D

ROGERS D. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America,

Defendant,

THE DELAWARE TRIBE OF INDIANS,

Intervenor.

NOTICE OF CLASS ACTION LAWSUIT—
CERTIFIED MAIL

TO: MEMBERS OF THE *KANSAS DELAWARE* CLASS OF INDIANS, AS DEFINED BELOW.

[APPENDIX]

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commisssion Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Kansas Delaware class.

In this lawsuit, the representative Plaintiff, Wanda June Weeks, who is represented by Delmer L. Stagner and Stephen P. Friot, of the firm of Halley, Spradling, Stagner and Alpern, Attorneys at Law, Oklahoma City, Oklahoma, and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, represented by John Ghostbear, Attorney at Law, of Tulsa, Oklahoma, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated

to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce

Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Kansas Delaware class. You will be bound by the judgment of this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, v. UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, Defendants,	)	No. CIV-73-586-E
and	)	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs, v. ROGERS D. MORTON, individually and in his capacity as Secretary of the	)	No. CIV-74-368-D

[APPENDIX]

Interior of the United States of America,)
Defendant,)
)
THE DELAWARE TRIBE OF INDIANS,)
Intervenor.

NOTICE BY PUBLICATION OF CLASS ACTION LAWSUIT

TO: MEMBERS OF THE DELAWARE TRIBE OF INDIANS, DESIGNATED HEREIN AS THE CHEROKEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your. rights. In No CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Cherokee Delaware class.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty,

both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma. The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Cherokee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT.

The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA and TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and	)	No. CIV-73-586-E

[APPENDIX]

GRACE SPOONER ROSE, Defendants,	)
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	)
v.	) No. CIV-74-368-D
ROGERS B. MORTON, individually and in his capacity as Secretary of the Interior of the United States of America, Defendant,	)
THE DELAWARE TRIBE OF INDIANS, Intervenor.	)

NOTICE BY PUBLICATION OF CLASS ACTION LAWSUIT

TO: MEMBERS OF THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA NOW KNOWN AS THE DELAWARE TRIBE OF WESTERN OKLAHOMA, DESIGNATED AS THE ABSENTEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier

and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1886, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior. This notice is being sent to you because you may be a member of the Absentee Delaware class.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgment funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma .The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow,

Henry A. Secondine and Y. A. Scott have been designated by the Court as representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, its members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Absentee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

[APPENDIX]

FILED
JAN 16 1976
10:15 AM
REX B. HAWKS
CLERK U. S. DISTRICT COURT
BY (s) *Joan H. Johanning*
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, Plaintiff, vs. THOMAS J. KLEPPE, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA AND TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY; and GRACE SPOONER ROSE, Defendants.	NO. CIV-73-586-E
and	(CONSOLIDATED)
DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated, Plaintiffs,	

VS.	)	
	)	
THOMAS J. KLEPPE, individually and in his capacity as Secretary of the Interior of the United States of America,	)	NO. CIV-74-368-D
Defendant,	)	
	)	
THE DELAWARE TRIBE OF INDIANS, THE ABSENTEE DELAWARE CLASS on behalf of the DELAWARE TRIBE OF WESTERN OKLAHOMA,	)	
Intervenors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Absentee Delaware Class, and the individual representative members of said class, as defined in the Court's Order of November 1, 1974, certifying this action as a class action, pursuant to F.R. Civ.P. 23(b)(1)(B) and F.R.Civ.P. 23(b)(2), and the Court's Order of May 22, 1975, granting intervention in No. CIV-74-368-D, the Absentee Delaware Tribe of Oklahoma Business Committee, a named defendant and named intervenor in the action, and the individual members of the Absentee Delaware Tribe of Oklahoma Business Committee, named as defendants and intervenors in this action hereby appeal to the Supreme Court of the United States from the final judgment holding partially invalid, and enjoining in its entirety, the operation of Pub.L. 92-456, 86 Stat. 762, 25 U.S.C. Secs. 1291-1297, entered in this action on December 18, 1975.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

TOMERLIN, HIGH, PATTON & ROTHBAUM

s/ By: B. J. Rothbaum, Jr.
B. J. Rothbaum, Jr.

[APPENDIX]

CERTIFICATE OF SERVICE

I, B. J. Rothbaum, Jr., a member of the Bar of the United States District Court for the Western District of Oklahoma, and a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on this 16th day of January, 1976, serve one true and correct copy of the above and foregoing Notice of Appeal upon: Mr. Delmer L. Stagner and Mr. Stephen P. Friot, Suite 700—101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for plaintiff, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record of plaintiffs, Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for defendant Secretary of the Interior of the United States; Mssrs. Watts, Looney, Nichols, Johnson and Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for defendant Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, 7th and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for defendant Cherokee Delaware Class, and named individual members thereof, by placing the same in the United States mail, first class postage fully prepaid; I further certify that I did, on the 16th day of January, 1976, serve a true and correct copy of the above and foregoing Notice of Appeal upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D. C. 20006, counsel of record for plaintiff Wanda June Weeks; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D. C. 20420, counsel of record for the defendant Secretary of the Interior of the United States, by placing a copy of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this 16th day of January, 1976, in conformity with 80 Stat. 613, 28 U.S.C.

Section 518, serve a true and correct copy of the above and foregoing Notice of Appeal upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

s/ B. J. Rothbaum, Jr.
B. J. Rothbaum, Jr.

APPENDIX B

82 Stat. 861, 862, 25 U.S.C. Sections 1181-1186:

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing

to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the roll prepared in accordance with section 1181 of this title. No person shall be entitled to more than one per capita share of the funds.

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years

of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests.

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

APPENDIX C

TREATY OF 1854 (10 STAT. 1048) (RATIFIED JULY 11, 1854)

Treaty of 1854 (10 Stat. 1048, ratified July 11, 1854) between the Delaware Tribe of Indians and the United States provides, inter alia, as follows:

ARTICLE 1

The Delaware tribe of Indians hereby cede, relinquish, and quit-claim to the United States all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas Rivers, which is described in the article supplementary to the treaty of October third, one thousand eight hundred and eighteen, concluded, in part, on the twenty-fourth September, one thousand eight hundred and twenty-nine, at Council Camp, on James' Fork of White River, in the State of Missouri; and finally concluded at Council Camp, in the fork of the Kansas and Missouri Rivers, on the nineteenth October, one thousand eight hundred and twenty-nine; and also their right, title, and interest in and to the "outlet" mentioned and described in said supplementary article,

excepting that portion of said country sold to the Wyandot tribe of Indians, by instrument sanctioned by act of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kanzas, forty miles, in a direct line, west of the boundary between the Delawares and Wyandots, thence north ten miles, thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river.

ARTICLE 2

The United States hereby agree to have the ceded country (excepting the said "outlet") surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum Government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

ARTICLE 3

The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quit-claim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

ARTICLE 7

It is expected that the amount of moneys arising from the sales herein provided for will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

ARTICLE 8

As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that

portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body, seem just and proper.

ARTICLE 11

At any time hereafter, when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: Provided, Such assignment shall be uniform.

ARTICLE 15

A primary object of this instrument being to advance the interest and welfare of the Delaware people, it is agreed, that if it prove insufficient to effect these ends, from causes which cannot now be foreseen, Congress may hereafter make such further provision, by law, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Delaware people.

ARTICLE 16

It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded.

ARTICLE 18

This instrument shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and the Senate, of the United States.

APPENDIX D

TREATY OF 1860 (12 STAT. 1129) (RATIFIED JULY 27, 1860)

Treaty of 1860 (12 Stat. 1129, ratified July 27, 1860) between the Delaware tribe of Indians and the United States provides, inter alia, as follows:

ARTICLE 1

By the first article of the treaty made and concluded at the city of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and certain delegates of the Delaware tribe of Indians, which treaty was ratified by the Senate of the United States on the eleventh day of July, one thousand eight hundred and fifty-four, there was reserved, as a permanent home for the said tribe, that part of their country lying east and south of a line beginning at a point on the line between the Delawares and Half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in a easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri river, where the usual high-water line of said creek intersects the high-water line of said river. And by the eleventh article of said treaty it was stipulated that "at any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home, to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided*, such assignments shall be uniform."

The Delawares having represented to the government that it is their wish that a portion of the lands reserved for

their home may be divided among them in the manner contemplated by the eleventh article of the treaty aforesaid, it is hereby agreed by the parties hereto, that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey. (Emphasis added)

ARTICLE 2

The division and assignment in severalty among the Delawares of the land shall be made in a compact body, under the direction of the Secretary of the Interior, and his decision of all questions arising thereupon shall be final and conclusive.

Certificates shall be issued by the Commissioner of Indian Affairs, for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that the said tracts are set apart for the exclusive use and benefit of the assignees and their heirs.

And said tracts shall not be alienable in fee, leased, or otherwise disposed of, except to the United States or to members of the Delaware tribe, and under such rules and regulations as may be prescribed by the Secretary of the Interior; and the said tracts shall be exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.

Prior to the issue of the certificates aforesaid, the Secretary of the Interior shall make such rules and regulations as he may deem necessary or expedient, respecting the disposition of any of said tracts, in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased

persons. And should any of the Indians to whom tracts shall be assigned, abandon them, the said Secretary may take such action in relation to the proper disposition thereof, as, in his judgment, may be necessary and proper.

The improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained.

ARTICLE 3

The Delaware tribe of Indians, entertaining the belief that the value of their lands will be enhanced by having a railroad passing through their respective reservation, and being of the opinion that the Leavenworth, Pawnee, and Western Railroad Company, incorporated by an act of the legislative assembly of Kansas Territory, will have the advantage of travel and general transportation over every other company proposed to be formed, which will run through their lands, have expressed a desire that the said Leavenworth, Pawnee, and Western Railroad Company shall have the preference of purchasing the remainder of their lands after the tracts in severalty and those for the special objects herein named shall have been selected and set apart, upon the payment into the United States treasury, which payment shall be made within six months after the quantity shall have been ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, shall appraise to be the value of said land: *Provided*, in no event shall the value be placed below the sum of one dollar and twenty-five cents per acre, exclusive of the cost of the survey of the same. (And that the United States will issue a patent in fee-simple to said company, upon the payment as aforesaid, for all the land remaining in Kansas.) It is, therefore, agreed by the United States that the wishes of the Delawares shall be granted; that they will acccept of the trust

reposed upon them; and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the seventh and eighth articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances.

And provided further, That the said railroad company shall, finally, and in good faith, sell and dispose of all said lands within seven years after receiving the patent therefor, except what may be necessary for railroad purposes; and in default thereof so much thereof as may remain undisposed of shall revert to the Delaware nation, to be disposed of as herein provided for other forfeited lands.

ARTICLE 4

Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong to the nation in common.

ARTICLE 8

Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

ARTICLE 10

The interest accruing to the Delawares under the former treaties, and that which may accrue under this, shall be paid on the first of April and October in each year.

APPENDIX E

TREATY WITH THE DELAWARES, 1866.

Articles of agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof,—and which company has built a railroad connecting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands,—has expressed a desire to purchase the present Delaware Indian reservation in the said State, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, viz:

ARTICLE 1. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

ARTICLE 2. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

ARTICLE 3. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the

Secretary of the Interior, when the Department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided*, That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further*, That in case there shall be improvements upon any heretofore allotted lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at the same time as if the said lands had been sold to the railroad company or other parties.

ARTICLE 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware

council shall so request; when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

ARTICLE 5. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

ARTICLE 6. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home, provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the Treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained, at the rate of five (5) per cent. per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

ARTICLE 7. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the

terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for such purchase shall be concluded by the said secretary with said Missouri River Railroad Company, at not less than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold: *Provided, however,* That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D. C., to the credit of the said secretary, for an amount equal to ten per cent. of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

ARTICLE 8. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation and the quarter sections upon which the council-

house and blacksmith-shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for, patents therefor, conveying the same in fee-simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

ARTICLE 9. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the Commissioner of Indian Affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof, to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the Commissioner of Indian Affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled

to receive a patent, in fee-simple, with power of alienation, for the land heretofore allotted him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent, in fee-simple, for the lands heretofore allotted to them, and, if they do not remove with the nation, their *pro rata* share of all annuities and trust-property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

ARTICLE 10. It is further agreed that the funds of the Delawares shall never be applied by the Government to the payment of the debt or debts of any individual member

or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

ARTICLE 11. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

ARTICLE 12. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be valued at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

ARTICLE 13. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

ARTICLE 14. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and

sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the Government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section of the treaty of eighteen hundred and sixty; and inasmuch as the Delawares claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appropriated for such purpose shall be paid to the owners of said stock.

ARTICLE 15. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

CERTIFICATE OF SERVICE

I, Bernard J. Rothbaum, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I did, on the 16th day of March, 1976, serve three true and correct copies of the above and foregoing Jurisdictional Statement upon: Mr. Delmer L. Stagner, Suite 700, 101 Park Avenue Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellee, Wanda June Weeks; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Appellees, Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Appellant, Secretary of the Interior of the United States; Mssrs. Watts, Looney, Nichols, Johnson and Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Appellant, Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, 7th and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for Appellant, Cherokee Delaware Class, and named individual members thereof, by placing the same in the United States mail, first class postage fully prepaid; I further certify that I did on the 16th day of March, 1976, serve a true and correct copy of the above and foregoing Jurisdictional Statement upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue, Washington, D.C. 20006, counsel of record for Appellee, Wanda June Weeks; Mr. Joseph Fontana, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Appellants, Cherokee Delaware Class and named individual members thereof; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for Appellant, Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did on the 16th day of March, 1976, in conformity with Rule 33, 2(a) of the Rules

of the Supreme Court, serve three true and correct copies of the above and foregoing Jurisdictional Statement upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served; and that service has been made in conformity with Rule 33 of the Rules of the Supreme Court.

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Bernard J. Rothbaum, Jr.